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Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1997

RUTH J. KUHNS,

*Petitioner,*

*vs.*

CORESTATES FINANCIAL CORP., successor to MERIDIAN BANCORP, INC., successor to THE FIRST NATIONAL BANK OF ALLENTOWN,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## PETITION FOR WRIT OF CERTIORARI

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93 pp

## QUESTIONS PRESENTED

### A. National Issues

I. At a time of 7,000 to 10,000 mergers per year in the nation, may an acquiring bank in a merger use the merger provisions of ERISA, 29 U.S.C § 1058, to its own benefit and to the disadvantage of the participants in a profit sharing plan by bringing 15 new groups of participants into the plan to avoid (evade?) the plan termination requirements of the Act, such as, among others, distribution of all of the assets to the beneficiaries, or paying an excise tax of 20% (or 50%) of the amount taken by it from the participants' trust fund?

II. At a time of historically high earnings on investments in the nation may a Trustee/Employer of a profit sharing trust fund for the exclusive benefit of the employees, arbitrarily set a 5% rate of return on profit sharing trust investments and keep all of the excess earnings for itself to meet its obligation to fund 15 other pension funds?

### B. Private Issues

III. Who are the "participants" who, under ERISA, 29 U.S.C. § 1103 (c), are the persons for whom the assets of the Profit Sharing Trust ". . . [s]hall be held for the exclusive . . ." purpose of providing benefits to them?

IV. Does the Statute of Limitations under ERISA, at 29 U.S.C. § 1113, extinguish or divest the vested rights to the accrued benefits of the participants in their Profit Sharing Trust or do those accrued benefits remain fully vested in them until distributed to them?

V. Has the Petitioner, Ruth Kuhns as the representative of the Plaintiff Class, pleaded a case, which under Rule of Civil Procedure 12(b)(6), states a claim on which relief can be granted?

## PARTIES TO THE PROCEEDINGS

The Petitioner is Ruth J. Kuhns, on behalf of a class of herself and all others similarly situated. Initially, in prior litigation, in the United States District Court for the Eastern District of Pennsylvania and thereafter through the United States Circuit Court of Appeals for the Third Circuit there were two additional representative plaintiffs, Blake C. Heffner and William W. Shellhammer, but they have withdrawn as representative plaintiffs; their names appear on many of the documents on record in the courts below which were filed before their withdrawal. The Respondent bank threatened to sue the three-representative plaintiffs individually for the bank's attorneys fees and costs if they pursued the litigation. Mr. Heffner recently underwent open heart surgery and did not want to expose his individual assets to a claim where he had been acting on behalf of all other employees or former employees of the bank; and the wife of Mr. Shellhammer is in poor health, and she did not want to endure the pressure and tension of personal litigation against her husband of more than 50 years and urged him to withdraw from the action as a representative of the class. Because of these factors both Mr. Heffner and Mr. Shellhammer have withdrawn as named plaintiffs.

The Respondent is CoreStates Financial Corp., successor to Meridian Bancorp, Inc. successor to the First National Bank of Allentown.

## STATEMENT PURSUANT TO RULE 29.6

The Petitioner is an individual so that this Petition is not being filed by a corporation, but the litigation was instituted by a Petitioner (along with two other persons who have withdrawn as representative plaintiffs, explained above) in part on behalf of an employee benefit trust fund which is a corporation, CoreStates Financial Corp. ("CoreStates") of Philadelphia, PA, which at the same time is also the Respondent. To that extent it should be reported it is believed that CoreStates has no parent and that its subsidiaries are all wholly-owned. However, CoreStates has recently announced an agreement or proposal to merge with First Union Corporation of Charlotte, N.C., another banking corporation. It is believed that it has many wholly-owned subsidiaries.

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## RULE 14(d) CITATIONS

At this time, and after research, it does not appear that there are any official or unofficial reports of the Opinions and Orders entered in the case by courts or administrative agencies. (The Opinions and Orders served on counsel for the petitioner are reproduced in the Appendix.)

## REFERENCE TO OPINIONS DELIVERED IN THE COURTS BELOW

The Order of the Court of Appeals for the Third Circuit that is the subject of this Petition immediately follows. There was no separate Opinion accompanying the Order. The Order, insofar as is known, was not reported officially or unofficially. Nor was the final Order of the District Court printed in any service; it is printed in the appendix at page 12a.

(Order of the Third Circuit in *Kuhns et al. v. CORESTATES FINANCIAL CORP.*, No. 98-1303)

Present: Becker, Nygaard, and Roth, *Circuit Judges*

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 26, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

**Rule 14(e) Basis for Jurisdiction.**

(i) The order being sought to be reviewed was entered in the United States Third Circuit Court of Appeals on June 26, 1998. (The Petition is not filed under Rule 11.)

(ii) There was no rehearing.

(iii) Inapplicable to the Petitioner.

(iv) The jurisdiction of this Court as stated is invoked under 28 U.S.C. § 1254(i).

(v) Rules 29.4(b) and (c) are inapplicable.

## STATEMENT OF THE CASE

At the outset in order to help the Court understand the magnitude of the problem, and that it is a national issue, a brief comment on corporate mergers should be made. *The New York Times* in an article published on Sunday, August 2, 1998, dealing with investment bankers, at page 1 of Section 3, the Business Section, stated in reference to mergers and acquisitions, "On average, there have been 29 deals a day." It doesn't report that they have been averaged over 250 working days or 365 calendar days in a year, but they would amount to approximately 7,000 to 10,000 mergers a year. There is no suggestion that the acquirer in each instance "took" the assets of the acquired corporation's profit sharing trust fund for its own purpose or precisely how many of them existed. But the opportunity is there and the Court should make it clear, by granting the writ sought in this petition where the "taking" has occurred, that the Court, under ERISA, does not condone a trustee/employer's "taking" the assets in an employee's profit sharing trust fund to pay its own obligation to fund pension plans for other employees brought into employment by the merger. With that many mergers per year, and considering the probabilities of what is or can be occurring in the marketplace, it is likely that many other profit sharing trusts will have the same experience. This *Kuhns* case is not an isolated situation and the Court should accept the case and grant the Petition for the Writ. The District Court had jurisdiction of the matter under ERISA, 29 U.S.C. § 1132(e)(1).

## CORESTATES ACQUIRED MERIDIAN

This case has been pleaded as a Class Action seeking relief under ERISA, 29 U.S.C. § 1001 *et seq.* Mrs. Kuhns, the petitioner, is a member of, and the representative of, a Class of people who are mostly retired persons, or beneficiaries of deceased former retirees, or former participants, as employees of the First National Bank of Allentown

(First National) in a Profit Sharing Plan established by First National for all of its employees in 1954. Three directors of First National were the Trustees of the Profit Sharing Plan. CoreStates Financial Corp. (CoreStates), of Philadelphia, PA the respondent, acquired Meridian Bancorp, Inc. (Meridian) in a merger in 1996 and became the successor to Meridian; Meridian had earlier acquired First National through a merger in 1985, and became the successor to First National. It is possible that CoreStates has recently become a subsidiary of First Union Corp., a banking corporation of Charlotte, N.C., but insofar as is known the name of the employee benefit trust fund has not been changed.

In 1971, First National, as employer, established a Pension Plan for all of its employees, the persons or their predecessors who are Members of the Plaintiff Class. First National was the settlor and Trustee of the Plan. At the same time First National "took" (as it says) all of the assets of the Profit Sharing Trust held by it as Trustee and turned them over to itself to meet its contractual and statutory obligations to fund the Pension Trust. The Bank had a conflict of interest between itself as the employer and the legally obligated contributor to the Pension Plan on the one hand, and as Trustee for the participants in the Profit Sharing Plan on the other. This transfer (without consideration) was contrary to both the law and the terms of the Profit Sharing Trust Agreement even though amended in 1971 to effectuate the transfer.

## RATES OF RETURN

Mrs. Kuhns and her two initial co-litigants on behalf of the Class brought suit in 1992 (the first suit) against Meridian to get the vested benefits for the Class in full and with a proper rate of earnings. She brought this action approximately two years after her retirement. The Trustee/Employer/Bank (Meridian) defended on the basis of the Statute of Limitations and laches, and claimed that the 4% interest it was accruing on the Trust accounts of the individuals was proper and reasonable in 1971 although it unilaterally increased it to 5% five years later; the rate at 5% remains today. The District Court granted Partial Summary Judgement on the Trustee/Bank's motion (later orders substantially revised this) but ruled that the 4% interest rate

was arbitrary and directed that a Hearing be held for the purpose of determining a "reasonable" rate. The District Court in the first case on its own motion would not allow a Hearing or any evidence on any subject other than a "reasonable" rate of earnings; it would allow a Hearing on the case as pleaded.

After a second Hearing, ordered by the District Court, this resulted in a finding of fact that the "reasonable" rate of interest 7.4% (not according to the Agreement which by implication required the *actual* earnings) and that 7.4% should be used to calculate the cost and the benefits in the Pension Plan, and that the vested interests of the participants in the Profit Sharing Trust should be applied to pay the pension benefits, thus nullifying their vested interests in the Profit Sharing Trust. Mrs. Kuhns, the Petitioner, claim that this is contrary to law and to the Agreements and appealed to the United States Court of Appeals for the Third Circuit, and after an order which failed to resolve many of the issues but which appears to be adverse to the Class, she, on behalf of the Class, previously petitioned the Supreme Court for a writ of certiorari to obtain relief. The Trustee/Employer/ Bank also disagreed with the Final order of the District Court and it filed a cross-appeal in the Third Circuit arguing that the action was time-barred. It appears to have prevailed on that issue in the cross-appeal and the first case was dismissed as being time-barred by the Statute of Limitations. Mrs. Kuhns' prior petition for the writ was denied.

## MEDIATION

An attempt to mediate this dispute under Third Circuit rules was made before Judge Louis Pollak, a Senior Judge in the Eastern District of Pennsylvania. (Judge Pollak had formerly been Dean of Yale law School and later Dean of the University of Pennsylvania Law School.) The attempt lasted for a few hours one afternoon but early the next morning before Mediation was really under way, Judge Pollak had to withdraw to be hospitalized for scheduled surgery. Nothing ever came from that attempt at Mediation but because of the complexity of this case Mediation should be tried again.

## NEW (CURRENT) COMPLAINT

Then Mrs. Kuhns, as the Class representative, started the second case, the current one. The Complaint appears in the Appendix at pp. 13a-54a. This new Complaint pleads that on January 1, 1997 and each month thereafter CoreStates had "taken" more than $35,000,000 of assets fully vested in the Plaintiff Class from the Profit Sharing Trust Fund to pay the Bank's own obligation to fund new pension plans for 15 groups of strangers. (With additional earnings, by mid-1998 this sum had increased to $45,000,000.)

The Bank defended this new suit by moving to dismiss under Rule 12(b)(6) (which used to be called a "demurrer"). It did not plead an Answer of any kind. But in its 12(b)(6) motion it argued that the new Complaint had been time-barred by the Statute of Limitations. It convinced District Judge Joyner that the new Complaint had been previously decided by the Statute of Limitations and therefore the matter was res judicata,

Judge Joyner in the District Court did not hold an oral argument on 12(b)(6) motion, but instead held a Status Conference. At the Conference when it became apparent that he did not understand the case, he stated, in response to a question from counsel for the plaintiffs, that he had not read the Complaint! In less than two days he filed a 10 page Opinion and Order which sounds much like a brief for the Trustee/Employer. He sustained the Rule 12(b)(6) Motion of the Trustee/Employer and dismissed the complaint ". . .[w]ith prejudice." He wrote that the ". . . [a]ction is barred by the doctrine of *Res Judicata*." (App. p. 12a.) He failed to understand that the rights of the Members of the Plaintiff Class, as had been pleaded in paragraphs 15 through 19 of the Complaint, App. pp. 22a-25a, were *fully vested* in them, and therefore could not be taken away from them by the Trustee/Employer/Bank, but also that they had done nothing to "forfeit" their "non-forfeitable" rights. (See 29 U.S.C. § 1103(c)).

## NO DESTRUCTION OF RIGHTS

The Trustee/Employer/Bank did not respond in any manner (not even in argument) to the allegations in paragraph 22 of the Complaint

that this Court in *Campbell v. Holt*, (1885), 115 U.S. 620, 6 S. Ct. 209, and in *Chase Securities Corp. v. Donaldson*, (1945), 325 U.S. 896, 65 S. Ct. 1137, had ruled ". . . [t] hat statutes of limitation go to matters of remedy, not to destruction of fundamental rights." The District Judge completely ignored these pleadings and the allegations surrounding them. His Opinion and Order are written just as though the Plaintiff Class had never pleaded them and further that their Profit Sharing Trust Fund had been transferred to the Bank as its own property.

The purpose of this suit is to recover more than $45,000,000 for the benefit of the Members of the Plaintiff Class. The suit is based on the unlawful "taking" by the Trustee/Employer/Bank. More details relating to the suit are stated in the Argument which appears below.

## REASONS FOR GRANTING THE WRIT

The reasons for allowing the Writ really abound, but following the suggestion that brevity of the Petition is looked on with favor, the number of reasons will be limited.

There is one central question to be decided in this matter. Who gets the money, the assets of the Profit Sharing Trust, vested in the participants, when it is unlawfully "taken" by the Trustee/Employer/Bank and transferred by it to itself, the same Bank, for it to use to pay its own contractual statutory obligations to fund 15 other new Pension Plans, all for different people? The employee participants or the Bank? The question deals with the benefits payable at retirement to the Members of the Plaintiff Class from the Profit Sharing Plan, but not the Pension Plan. All other subsidiary questions involved in this matter will be resolved by the decision made in response to this question.

## I.

## CONTRIBUTIONS DISCONTINUED

Mrs. Kuhns is the representative of a Class of persons nearly all of whom are now retired but were employees of and participants in

the Profit Sharing Retirement Plan and Trust of the First National Bank of Allentown on January 1, 1971. On that date they became participants in a new Pension Plan established by First National for the same people. The Bank then discontinued contributions to the Profit Sharing Plan. This is different from "terminating" the Plan because the assets were not distributed to the participants, the Plaintiffs, the Petitioners, as required by the Plan (see below) and by the law. Meridian claimed that the Profit Sharing Plan was discontinued on January 1, 1971 and "converted" to the Pension Plan; this is incorrect. The question of termination of the Profit Sharing Trust was never put to the test of an examination by the Treasury Department or a trial in court in this case even though the petitioners pleaded that their individual balances in the Trust Fund were fully vested. The Agreement between the three directors of the Employer/ Trustee/Bank as Trustees on the one hand, and the Bank itself on the other, transferring the assets required that the Bank obtain Treasury Department approval to do it, which it never did nor could it obtain such approval because of Treasury Regulation Sec. 1.401-1(b)(3) and Rev. Rul. 69-295 (both in the App. at pp. 64a-65a) as pleaded, which prohibit "converting" a profit sharing plan to a pension plan by the same employer for the same employees. Both were then and are still now in effect. (It might be possible, although it is not an issue in this case, to do the reverse, *i.e.*, switch a pension plan to a profit sharing plan under some circumstances.)

## II.

## STATUTE OF LIMITATIONS

At the outset of the 1992 litigation the Employer/Trustee moved for Summary Judgement on the basis of the Statute of Limitations and laches, and Mrs. Kuhns, the Petitioner, and her co-litigators resisted that Motion. The Employer/Trustee represented to the District Court, among other things, that although the vested benefits of the participants in the Profit Sharing Plan had been "taken" by it, the employees knew of this taking and that therefore by the time of the 1992 action their claims were barred by the Statute of Limitations. The Trustee/Employer/ Bank claims that the employees' benefits were lost because of the Statute of Limitations and have been extinguished

and forfeited to the Bank and are now owned by or held for the benefit of the Bank as employer, not for the participants. And the Trustee/ Employer is now using that money to pay pensions to 15 other groups it has brought into the Plan by a merger to whom it owes pensions and to meet its statutory obligation to satisfy the requirements of the Minimum Funding Standard Account under ERISA, 29 U.S.C §§ 1082(a) and (b). The inarticulate major premise of the Trustee/ Employer/Bank, the respondent in this proceeding, is that the Statute of Limitations under ERISA has given the Profit Sharing Trust Fund to it and has taken away the vested benefits from the participants. The premise is stated as:

> Members of the Plan, we have taken your vested assets in the Profit Sharing Trust but you didn't sue us soon enough, and we are keeping your assets for ourselves. They are now our property. You have forfeited them to us by not suing in time, and we have divested your vested interests, and we are paying your $45,000,000 in the Profit Sharing Trust to 15 other new groups of persons whom we have brought into the Trust Fund by merger to satisfy our obligation to pay them pension benefits. Because you didn't sue us soon enough your rights to the $45,000,000 are extinguished in spite of what the Supreme Court says in two published opinions, even though they are pleaded in the 1997 Complaint.

The District Judge in the 1992 litigation partially granted the Motion for Summary Judgment by holding that the Statute of Limitations had barred some of the claims of the Plaintiffs but then did allow Ruth Kuhns and Blake Heffner (one of the other initial litigants) to go back 3 years from the date of commencement of the 1992 suit, and allowed William Shellhammer (the other initial litigant) to go back 6 years, to claim their benefits, to be paid from their vested Profit Sharing benefits. This was reversed by the Third Circuit on Statute of Limitations grounds.

## III.

## PLAN NOT TERMINATED

The Trustee /Employer claims that the Profit Sharing Trust is now terminated. This is incorrect and is contrary to the Trust Agreement which requires that the assets be distributed to the participants just before termination; *i.e.*, there can be no termination until after the distribution. Also it is contrary to the annual Reports that the Trustee is submitting, as required, to the Treasury Department and the Labor Department on Form 5500. As to the latter, the Trustee has been reporting in a verified statement year after year that the *Plan has not been terminated in the current or any prior plan year,* and *that the assets have not been distributed* to the participants, a distribution that is required by ERISA. The requirement that assets be distributed on plan termination (29 U.S.C. § 1344 *et. seq.*) applies by statute to pension plans, but there can be a reasonable question raised as to whether this also applies, within the statute, to a profit sharing plan that provides that the benefits shall be paid at retirement (i.e., it also in part is a pension plan, as defined by 29 U.S.C. § 1002(2)(A)(i)). The Trustee Employer's Trust Agreement, prepared by itself, as pleaded in paragraph 24(c) of the Complaint (App. p. 30a), states that it shall continue in effect ". . . [u]ntil the Trust Fund has been distributed. . .". By not pleading in response to this the Trustee /Employer, the respondent (then the defendant), admitted this. (A motion is not a pleading.)

## IV.

## NON INUREMENT TO EMPLOYER

This matter should be determined by Plan provisions that state that at no time may the assets which are held in trust for the Plan participants be turned over to the employer, and is further governed by ERISA 29 U.S.C. § 1103(c)(1), which provides that . . . "[t]he assets of a plan shall never inure to the benefit of any employer. . .". The Bank now claims that the assets which it "took" in 1971 can be used by it for its own purposes, and it may keep them, which is further contrary to the mandate in § 1103(c)(1) that the assets of the Plan "

[s]hall be held for the exclusive purposes of providing benefits to participants in the Plan . . ." and for expenses, etc. These are TRUST assets as required by ERISA, 29 U.S.C § 1103(a). They are not the Bank's money and the Statute of Limitations did not give it to the Bank, as pleaded by the Petitioners in the first suit.

In the Spring of 1994 District Judge Cahn (the Chief Judge) ruled that 4% interest that the Trustee/Bank had determined to credit to each person's Profit Sharing account balance was arbitrary. This was the only proceeding resembling a Trial held in this case. He found as a fact that instead of 4% in 1971 it should have been 7.4%, and then he ruled later that 7.4% should be compounded until paid. As of mid-1998 (as of this writing) everyone's 1971 balance (with at least 26 years of accumulated *actual* earnings) was approximately 18 times greater than what it was in 1971. The earnings are to be accrued every year from 1971 right through the years of retirement. The Bank had stopped accruing the 4% (or 5% after it had been increased) at retirement, and was paying principal only but no interest on the account balance after retirement and kept the interest (or the "earnings") for itself. These earnings during retirement make a big difference in retirement benefits (60% to 65%).

## V.

## PENSION IS A LIFE ESTATE

The decision-makers in this case have failed to understand that a pension benefit, in the language of the law, is a *life estate*; it is payable for the life of the participant although the actuarial equivalent may be payable to that person jointly with his or her spouse. But upon the death of life tenant(s), with a few exceptions, it ends, and no death benefit as such is payable from any balance in that participant(s)' pension account. (IRC § 401(a)(9)).

On the other hand a profit sharing benefit (while a part of it may be a life estate) is a fee simple absolute interest in the retirement fund; it is more than a life estate. The entire interest held in the Profit Sharing Trust Fund must be paid to the participant, or if he dies then to his designated beneficiaries or his estate; it does not end with the

death of the employee. In the vernacular, it is the "whole ball of wax." In this case there is a separate profit sharing plan (which came first) and a separate pension plan (which came later) although both are administered and held and invested in the same Trust Fund. This is not unusual and a more coherent investment policy (for the two plans) can be established and usually the participants can be better served. With computers the records can be easily kept.

It is true enough that the participants have no claim to the "surplus assets" in a pension plan (*see Borst et al. v. Chevron Corp. et al.*, 36 F.3d (5th Cir. 1994). *Borst* is a thoughtful and well-reasoned decision and covers some of the problems in this case, *Kuhns*. But it deals with pension rights, and not *profit sharing* rights. There are no "surplus assets" in a profit sharing trust; once vested they belong to, and shall be paid exclusively to, the participants. (29 U.S.C. § 1103(c)). This distinction could not be brought home to Judge Cahn in the "reasonable interest" trial nor to Judge Joyner in the second case in which he did not hold a Hearing or read the Complaint.

## VI.

## ACCOUNTS INCREASED 18 TIMES

At the Hearing leading to the Final Order of the District Court in the first case (there was No Hearing in the second case), through evidence admitted and on the Record, and through calculations made from documents obtained from the Trustee/Bank through Discovery, it was learned that by the end of 1996 the individual accounts in the Profit Sharing Trust vested in the Members of the Plaintiff Class individually in 1971, had increased more than *18 times*, and by the middle of 1998 this amounted to a size of more than $45,000,000. This is the figure upon which their Profit Sharing benefits should be based. In the aggregate these claims at the cumulative rate of return by the end of 1996, as pleaded, amounted to more than $35,000,000 for the Plaintiff Class out of a combined trust fund for all of CoreStates Pension Plans of $212,000,000. The Third Circuit, and Judge Joyner in the District Court in the second case paid no attention to this egregious breach of trust and apparently have endorsed the Trustee/Bank's taking the assets and keeping them to pay its own legal and

statutory obligations, which specifically are 15 new pension plans for others. It is gone from the Profit Sharing Trust and that is what the Members of the Plaintiff Class, the petitioners, are suing about. (See the prayer for relief in the Complaint, pp. 20 and 21, in the Appendix at pp. 32a-33a.)

## VII.

## VESTED INTERESTS

Every one of the Pension and Profit Sharing Plans which are relevant in this case provides expressly that the account balances in the Profit Sharing Plan for each of the participants are *fully vested* in the participants. The Orders of the District Judges, in both of the cases, in effect divest those interests and forfeit them to the Bank, and they provide in whole or in part that the monthly *pension* benefits which are calculated according to the Orders shall be charged against the participant's vested *Profit Sharing* Account Balances, all to the credit of the Bank. This relieves the Bank of paying anything for the Pension benefits which have been earned by the participants since January 1, 1971 which is contrary to the Agreements and contrary to the law and permits the Employer/Trustee to satisfy its own obligation to fund 15 other Pension Plans with the participants' Profit Sharing Trust assets. Thus the Trustee/Employer is violating ERISA and the Agreements.

## VIII.

## PENSION TRUST OVERFUNDED

Further, the effect of the Third Circuit Order (the one in question in this Petition) is to nullify all of the Years of Credited Service (as such term is used in the 1971 and later Pension Plans) and persons like Ruth Kuhns will never receive any Pension Plan benefit; not ever. Whatever they are paid comes from their fully vested interests in the Profit Sharing Trust. All of this has apparently been approved by the Third Circuit in its order in the first case based on the Statute of Limitations, directing that judgment be entered for the Trustee/Bank "on all counts." As to other persons their years of Credited Service

under the Pension Plans are nullified in part arid allowed in part. This is not what the Plans provide or what the law allows. The courts below had no authority to amend the Plans in this manner. While there have been other pension funds acquired by Meridian and CoreStates in bank mergers, and the assets of those other pension funds have swelled the single pension trust fund, nonetheless the assets from the Profit Sharing Trust Fund "taken" by First National and CoreStates belonging to the Plaintiff Class, the petitioners, have been used by the Bank to meet both its contractual and statutory obligations. As the evidence showed in the "reasonable interest" trial the trust fund was so grossly overfunded (and now it is more than 150% of the actuarial liability) that for the 6 years from the end of 1989 through 1996, both inclusive, (1996 is the last year for which reported information is available at this writing), the Bank made no pension contributions to the trust fund in any of those 6 years; that is, no contributions for the last 6 years, according to public documents filed by the Trustee/Employer Bank, the respondent.

The Bank, as trustee, owes the assets held in the Profit Sharing Trust Fund to the members of the Plaintiff Class in proportion to the account balances credited to each participant as of January 1, 1971. Up to December 31, 1996 that amounts to more than $35,000,000 (which has been pleaded). Now in 1998 with additional accrued earnings, it amounts to more than $45,000,000. And the participants are also owed their vested Pension Plan benefits according to their Years of Credited Service under the Pension Plan, which by its terms is equal to all of the years employed by the Bank. The Third Circuit completely ignored the terms of the Pension Plan. Having both a pension plan and a profit sharing plan for the same employees is a common arrangement. It is common enough for the IRC, the Internal Revenue Code, to limit the deductions from income of the employer for contributions to both plans ". . . to 25 percent of the compensation otherwise paid . . ." to the participants during the taxable year [IRC § 404(a)(7)]. There is no provision in the Profit Sharing Trust or the Pension Trust that excludes Years of Service in calculating pension benefits for service under the Profit Sharing Plan. All years count and there is no basis for the Employer/Banks' argument that a participant, an employee who has worked for both benefits, is not to be paid both. One wonders why the argument is made at all by the

Respondent since the Trustee/Employer is "taking" the participants' own money, their fully vested Profit Sharing Trust Funds to pay the Bank's obligation to fund the Pension Trust.

## IX.

## USING PROFIT SHARING TRUST TO PAY PENSION COSTS

Further, the Employer/Trustee does not explain why it needs $45,000,000 of the participants' Profit Sharing Trust funds to pay the lump sum cost (even at this late date) of an annuity (or a reserve in the Trust Fund) to pay this pension benefit. It is estimated by the Petitioners that it should cost no more than $4,000,000, even if proper. But it should be understood that the Bank wanted to attract mergers with other banks, and allowing Past Service Credit for all of the years of service performed by an employee to an acquired bank or other financial institution, helped in this manner. Thus it entered into a pension agreement to pay the cost of this part of the Pension Plan; "taking" the profit Sharing Trust Funds is no warrant to have these assets now "inure to the benefit" of the Employer/Bank to pay this cost.

And so it goes. There are many other errors made by the courts below which could be noted in this Petition. One is reminded of the aphorism used commonly several decades ago: "This case portends endless vistas of litigation." And it will go on because the Trustee/Employer/Bank unlawfully "took" the participants' fully vested Profit Sharing Trust Fund and is using it for its own purposes to pay pension benefits to 15 other groups, and is saving itself the cost of paying for their pensions, instead of paying those assets to the 211 Members of the Plaintiff Class, the participants. Of those 211 persons there will always be someone to press to recover the millions of dollars "taken" from the participants' Profit Sharing Trust by the Trustee/Employer/Bank and used by the Bank for its own purposes. One cannot expect the Bank always to be so shortsighted as to oppose certifying this suit as a class action; Judge Cahn in the District Court tried to explain this to counsel for the Trustee. As the matter stands now there is no decision binding all 211 of the participants, and there are the holdings

of this Court hanging over the Trustee/Bank in both *Campbell* and *Chase Securities, supra,* and both cited in the Complaint, that the Statute of Limitations does not destroy fundamental rights. That is a claim that cannot be denied forever. This Court this time should reaffirm its own past rulings; there is nothing in ERISA to change this. The Profit Sharing Trust assets must always be paid to the participants.

And in the Pension Plan, although the members of the Plaintiff Class make no claim in this action for the "excess funds" or ". . . [a]ny residual assets . . ." (there are none in a profit sharing fund) , these may not be ". . . distributed to the employer. . ." until "(A) all liabilities of the plan to participants and their beneficiaries have been satisfied . . ." (29 U.S.C. § 1344(d)(i)), and under the Trust Agreement neither pension nor profit sharing funds may ever be distributed to the Employer. Also, by statute the assets in the Trust Fund shall *never* inure to the benefit of any employer. (29 U.S.C. § 1103(c)(1)). If there is no one else for the Trustee /Employer to pay the assets to, they must escheat to the state. This can raise problems as to whether they go to Pennsylvania or North Carolina, another of the endless vistas of litigation. And with $45,000,000 in assets held for the participants and vested in them and held in the Profit Sharing Trust, their claims will not die.

## X.

## THE PARTICIPANTS

Who are the participants? By this time (in this Petition), and after considering the Argument, it should be clear that they are persons for the purpose of this suit for whom contributions have been made. This is more than being employed by CoreStates (or any of its predecessors going back to First National) and being enrolled in the Plan (either one); it does not mean a person who is brought into the Plan by a merger who has no accrued benefit. Only "participants" are entitled to share in the benefits of this action.

## XI.

## THE DEMURRER

As to the Rule 12(b)(6) Motion of the Trustee/Bank, the ruling of the District Court, affirmed by the Third Circuit, is a "speaking demurrer" and faulty; it requires one to go outside of the Motion for unpleaded facts (which were incorrect). One should read the current Complaint. The Argument in this Petition clearly demonstrates that Mrs. Kuhns as the representative of the Members of the Plaintiff Class has pleaded a case for relief. It is erroneous for the District Judge to hold that ". . . [h]er claims were fully litigated in a prior action before Judge Cahn . . ." when Judge Cahn would not allow her claims to be litigated. By his insistence at the "reasonable interest" Trial, over the objection by counsel, he limited the litigation to his understanding of a case in the Seventh Circuit (*Hickerson v. Velsicol Chem. Corp.*, 778 F.2d 365 (7th Cir. 1985). It was materially different from this case, *i.e.*, Kuhns. As a result this case never did get tried on the pleadings. And the allegations in the current Complaint all state facts that have occurred since the prior litigation. One expects more than lip-service to the old and usual standard in a demurrer, that is, as stated by the District Judge, that ". . . [t]he court must accept as true the facts alleged in the complaint . . .". True enough, but reciting the established standards of the doctrine of *res judicata* does not make them apply to a given case if the facts are different. At the heart of the Complaint as filed in this case in the District Court, as stated above, is the allegation that this Court in both *Campbell* and *Chase Securities*, both *supra*, had ruled ". . . [t]hat statutes of limitations go to matters of remedy, not to destruction of fundamental rights." The rights of the Plaintiff Class have, by the District Court's ruling, been extinguished by the Statute of Limitations and thus not by *res judicata*.

First National and Meridian, its successor, first "took" the Profit Sharing Trust Assets, which were then taken by CoreStates (successor to Meridian), which if the Plaintiffs can get the current facts, may either still hold them or may have transferred the benefit of them to First Union as a trustee (as its successor). But these Trustee/Employer/Banks have currently "taken" these Profit Sharing Trust Funds from the Plaintiff Class. There is no denial of this. It is admitted. The Trustee

has "taken" the funds and is currently "taking" them. There is no Statute of Limitations that bars this. That is what this case is about.

## CONCLUSION

It is requested that the Court dispose of this Petition and the many difficult problems covered by it, including the potential dispute between the States of Pennsylvania and North Carolina. The Court should exercise its equitable powers and reinstate the Complaint and the Appeal, and then following the purpose of Rule 16.1, remand the case to the Third Circuit and direct the parties to proceed in good faith to Mediation according to the relevant rules of that court, and have the parties themselves settle the many claims in this dispute. If this were done now during the lifetimes of these "superannuated" Members of the Plaintiff Class, that could conclude this "endless vista of litigation".

Respectfully submitted,

HARRY A. DOWER
*Attorney for Petitioner*
1665 Lehigh Parkway North
Allentown, Pennsylvania 18103
(610) 821-1116

# APPENDIX

## APPENDIX A — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 26, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

June 1, 1998
A-127

No. 98-1303

RUTH J. KUHNS, Appellant

v.

CORESTATES FINANCIAL CORP.
(E.D. of PA. Civil No. 97-cv-05981 (JCJ))

Present: BECKER, *Chief Judge*, NYGAARD and ROTH, *Circuit Judges.*

1. Motion by Appellee for summary action affirmed the District Court's 3/20/98 Order, dismissing the appeal with prejudice *and* imposing sanctions against Appellant's counsel requiring him to pay all of Appellee's costs, expenses and attorney's fees reasonably incurred in responding to Appellant's appeal.

2. Response by Appellee in Opposition to the Motion for summary action.

s/ Anthony Infante
Anthony Infante 597-1898
Case Manager

*Appendix A*

ORDER

Appellee's motion for summary action dismissing appellant's appeal is granted. The order of the district court of March 20, 1998 is summarily affirmed. Costs taxed against appellant. However, the motion for further sanctions is denied.

By the Court,

s/ [illegible]
Chief Judge

Dated: JUN 26 1998

## APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED MARCH 24, 1998

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CIVIL ACTION

NO. 97-5981

RUTH S. KUHNS, on behalf of herself and all others similarly situated

vs.

CORESTATES FINANCIAL CORP., Successor to MERIDIAN BANCORP, INC. Successor to the FIRST NATIONAL BANK OF ALLENTOWN

**MEMORANDUM AND ORDER**

**JOYNER, J.** **March 20, 1998**

This case has been brought before the Court on motion of Defendant, CoreStates Financial Corp. to dismiss the plaintiff's complaint and for sanctions pursuant to Fed.R.Civ.P. 11. For the reasons which follow, the motion to dismiss shall be granted, the motion for sanctions shall be denied and the plaintiff's complaint dismissed with prejudice.

***Background***

This matter has its origins in a profit sharing and retirement trust plan ("the plan") which was created in 1954 for the benefit

of the employees of the First National Bank of Allentown, Pennsylvania. According to the allegations in the plaintiff's complaint, in January, 1984, First National merged with Meridian Bancorp, Inc., which was itself subsequently acquired in 1996 by defendant CoreStates Financial. Plaintiff contends that CoreStates (as the successor to both Meridian and First National of Allentown) assumed control over the plan and, as trustee for a group of fifteen or more other pension trusts maintained by it for the benefit of its own or the employees of other banks to which it succeeded in interest, "took" the assets, interest and proceeds from the First National plan and used them to make payments to the beneficiaries of the other trusts. Plaintiff further alleges that the amount "taken" to date is more than $35,000,000 and that the taking was in violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1103, *et. seq.*

In response, defendant moves to dismiss plaintiff's complaint under Fed.R.Civ.P. 12 (b) (6) on the grounds that her claims were fully litigated in a prior action before Judge Cahn of this Court and the Third Circuit Court of Appeals. In that case, which was docketed in the District Court at No. 92-4065 and in the Third Circuit at Nos. 94-1839 and 94-1869, plaintiff, along with two other retired employees of the First National Bank of Allentown, likewise sought payment of the plan's assets and funds to the members of the proposed plaintiff class (employees and/or former employees of First National of Allentown and/or Meridian Banks) in direct proportion to each person's account balance as of December, 1970, when First National switched from a profit sharing plan to a defined benefit plan. Defendant therefore now asserts that this action is barred under the doctrine of *res judicata.*

*Appendix B*

***Standards Governing 12(b)(6) Motions***

It has long been held that the issue of the sufficiency of a pleading may be raised by the filing of a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P.12 (b) (6) . In resolving a Rule 12 (b) (6) motion, the courts are to primarily consider the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case and exhibits attached to the complaint may also be taken into account. *Chester County Intermediate Unit v. Pennsylvania Blue Shield,* 896 F.2d 808, 812 (3rd Cir. 1990) In so doing, the court must accept as true the facts alleged in the complaint, together with all reasonable inferences that can be drawn therefrom and construe them in the light most favorable to the plaintiff. *Markowitz v. Northeast Land* Co., 906 F.2d 100, 103 (3rd Cir. 1990); *Hough/Loew Associates, Inc. v. CLX Realty Co.*, 760 F.Supp. 1141 (E.D.Pa. 1991). The court's inquiry is directed to whether the allegations constitute a statement of a claim under Rule 8 (a) and whether the plaintiff has a right to any relief based upon the facts pled. Dismissal under Rule 12 (b) (6) for failure to state a claim is therefore limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved. *Ransom v. Marazzo,* 848 F.2d 398, 401 (3rd Cir. 1988); *Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 944 (3rd Cir. 1985), *cert. denied*, 470 U.S. 935, 106 S.Ct. 267, 88 L.Ed.2d 274 (1985).

***Discussion***

Defendant here moves to dismiss plaintiff's complaint on the grounds that it is barred pursuant to the doctrine of *res judicata.* Under *res judicata* or claim preclusion, a final judgment on the

merits bars a subsequent suit on the same cause of action by the same parties and their privies. *Edmundson v. Borough of Kennett Square,* 4 F.3d 1861 189-191 (3rd Cir. 1993); *Railway Labor Executives Ass'n. v. Guilford Transportation Industries, Inc.*, 989 F-2d 9, 11 (1st Cir. 1993). *Res judicata* will not be defeated by minor differences of form, parties or allegations where the controlling issues have been resolved in a prior proceeding in which the present parties had an opportunity to appear and assert their rights. *Zhang v. Southeastern Financial Group, Inc.*, 980 F.Supp. 787, 794 (E.D.Pa. 1997). Thus, *res judicata* prevents a party from prevailing on issues he might have but did not assert in the first action. *Gregory v. Chehi,* 843 F.2d 111, 116 (3rd Cir, 1988).

Federal law determines the *res judicata* effect of a prior federal court judgment and holds that in order for the doctrine to apply, four requirements must be met. *Gulf Island-IV v. Blue Streak Gulf Is Ops,* 24 F.3d 743, 746 (5th Cir. 1994): (1) the parties in the instant action must be the same as or in privity with the parties in the prior action in question, (2) the court that rendered the prior judgment must have been a court of competent jurisdiction, (3) the prior action must have been terminated with a final judgment on the merits, and (4) the same claim or cause of action must be involved in both suits. *Id.; Greenbera v. Potomac Health Systems,* Inc., 869 F.Supp. 328, 330 (E.D.Pa. 1994).

Applying the foregoing to the case at hand and after carefully reviewing plaintiff's complaint and Judge Cahn's and the Third Circuit's orders in Case No. 92-4065, we find that the elements of *res judicata* have been satisfied and thus dismissal on this basis is appropriate. For one, the plaintiff in this action was one of three plaintiffs in the first action and, as is pled in ¶1 of the complaint, CoreStates is the successor in interest to First National Bank of Allentown and Meridian Bancorp. Identity of parties has therefore been established.

*Appendix B*

We also find that as Case No. 92-4065 was adjudicated in both this court and in the Third Circuit Court of Appeals, the judgments entered in that action were final, made on the merits and were obviously rendered by a court of competent jurisdiction. Indeed, as the records in that action reflect, following Judge Cahn's opinion and order of February 8, 1993 granting in large part defendant's (at that time Meridian Bancorp's) summary judgment motion, plaintiffs sought to take an interlocutory appeal, but that request was denied by the Third Circuit. A non-jury trial was then held and the court determined that while plaintiffs were not entitled to both a retirement and a profit sharing benefit as they claimed, the benefits to which they were entitled should be recalculated using a higher rate of interest than that provided in the defined benefit plan. Plaintiffs then appealed the district court's grant of summary judgment on most of their claims on the basis of the statute of limitations and defendant Meridian cross-appealed Judge Cahn's non-jury decision. The Third Circuit, in an opinion dated September 8, 1995, affirmed the grant of summary judgment but reversed the district court's finding that there had been a continuing violation of ERISA such that the statute of limitations did not apply to plaintiffs' claims as to the amount of their pension checks received between 1989 and 1992. Instead, Third Circuit concluded that these claims were also time-barred under §1113 of ERISA and reversed and remanded to the district court with directions to enter judgment in favor of defendants on all counts of plaintiffs' complaint. In so ordering, the Third Circuit further found plaintiffs' allegations that the bank(s) had "embezzled" their money to be patently false. (Slip Op., at p. 4).

The Third Circuit's decision did not end the prior action, however. After having moved for and been denied reconsideration by the Third Circuit, plaintiffs next moved to nevertheless compel

the trustees to pay them benefits and to pay attorneys' fees as provided in the now-reversed order of the district court. They also sought leave to file a "supplemental complaint." These motions were naturally both denied. Plaintiffs moved the district court to reconsider its decision denying these motions, which was also denied and they thereafter took a second appeal to the Third Circuit. In addition to summarily affirming the district court's denial of the motions to compel payments and to amend the complaint, on August 14, 1997 the Third Circuit sanctioned plaintiffs' attorney for causing defendant excessive costs and expenses pursuant to 28 U.S.C. §1927. In view of this history, it is difficult to conceive of a case that has been more fully finally litigated.

Finally and as noted above, the claims set forth in this case are virtually identical to and arise out of the same set of alleged facts and circumstances as those raised in the '92 action. Plaintiff, in fact, acknowledges this in paragraphs 22-26 of her complaint. However, in an effort to circumvent the application of *res judicata,* plaintiff appears to argue that because her claims in the prior action were found to be barred by the statute of limitations, they were never fully adjudicated on the merits. Plaintiff also avers that since the assets in the plan would by now have increased to more than $35,000,000, the defendant bank is still using this money ". . . for its own purposes at this instant, as it did one minute ago, one week, one month or one or three years ago." Thus, argues plaintiff, "no statute of limitations, and no rule against laches, can bar seeking a remedy in an action brought so promptly as this." (Pl's Complaint, 122(b) ).

We find plaintiff's position to have no merit whatsoever. Indeed, the Third Circuit recently had occasion to consider such a continuing harm argument in *Huck on Behalf of Sea Air Shuttle*

*Corp. v. Dawson,* 106 F.3d 45 (3rd Cir. 1997). In that action, following the entry of summary judgment in an antitrust action which arose out of the Virgin Islands Port Authority's refusal to permit Sea Air Shuttle Corp. to use its sea plane ramps plaintiff, a Sea Air shareholder, brought a derivative action on behalf of the corporation raising the same claims as those which had previously been dismissed. Plaintiff asserted that the continued denial of access to the ramps, although fully in compliance with the district court's judgment, created a new cause of action for liability and thus the derivative action was not barred by *res judicata.*

In flatly rejecting this argument, the Third Circuit noted this was not a case where there had been a change of circumstances concerning material operative facts but instead was one whereby the same facts that resulted in the earlier judgment had caused continued damage. While plaintiff contended there were issues in the second action which were not fully litigated in the first, those issues could have been raised but were not. Thus, since the derivative action arose from the same core of operative facts and circumstances as the earlier suit and given the undisputed privity between the parties in both suits, *res judicata* was properly applied to bar the second action. *See,* 106 F.3d at 49-51. Insofar as there also exist identity of parties, facts, claims and potential claims in the instant case and continued harm does not give rise to a new cause of action, we also conclude that *res judicata* operates to bar this action and that it is properly dismissed on this basis.

In addition to requesting dismissal of the plaintiff's complaint, CoreStates asks that this Court sanction both plaintiff and her counsel pursuant to Fed.R.Civ.P. 11 for their re-filing of the same claims which had previously been dismissed. Specifically, defendant seeks a court order directing that plaintiff and her attorney pay defendant's counsel fees and costs and permanently enjoining them

from filing any further actions arising out of or relating to the facts and claims asserted here and in the prior lawsuit.

In essence, Rule 11 provides that, in filing a pleading, motion or other paper with the court, an attorney or party has certified that to the best of his or her knowledge, the pleading, etc. has not been presented for any improper purpose (such as to harass, delay or impose unnecessary costs) , that the claims, defenses, etc. contained therein have evidentiary support and are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law. Fed.R.Civ.P. 11(b)(1) - (4). If, however, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may impose an appropriate sanction upon the attorney(s), party(ies) or law firm(s) that are responsible for the violation. Fed.R.Civ.P. 11(c).

The purpose of Rule 11 is to deter plaintiffs and defendants from filing papers in court which lack factual or legal support in order to save innocent parties and the courts from dealing with frivolous lawsuits. *Temple v. WISAP USA in Texas,* 152 F.R.D. 591, 600 (D.Neb. 1993). Mistaken judgment, ignorance of the law, or personal belief with regard to what the law should be do not provide the attorney with an excuse or defense if the lawyer who signed the pleading failed to make a reasonable inquiry into the facts and law supporting the pleading before it is filed. *Id.* Thus, the principal goal of Rule 11 sanctions is deterrence with compensation being a secondary goal. *Orlett v. Cincinnati Microwave, Inc.*, 954 F.2d 4141 419 (6th Cir. 1992). Since its amendment in 1993, the decision whether to issue sanctions under the rule rest within the court's discretion. *Anyanwu v. Columbia Broadcasting System, Inc.*, 887 F.Supp. 690, 694 (S.D.N.Y. 1995); *Clapp v. LeBoeuf, Lamb, Leiby & MacRae,*

862 F.Supp. 1050, 1062 (S.D.N.Y. 1994), both citing *Knipe v. Skinner*, 19 F.3d 72, 78 (2d Cir. 1994). As a result, the 1993 amendments are viewed to discourage imposition of monetary and other sanctions under the Rule where conduct does not reach the point of clear abuse. *Anyanwu*, at 694

In application of all of the foregoing, we find that plaintiff and her counsel have come perilously close to a blatant violation of Rule 11. Nevertheless, we shall exercise our discretion and defer the imposition of the requested sanctions at this time and on the basis of the existing record. In so holding, however, we strongly caution plaintiff and her attorney against the institution of any future lawsuits or motions by which she tries to again resurrect the claims and contentions asserted both in this action and in the preceding one. While we do not doubt the sincerity of plaintiff's belief that her claims are viable and were not previously litigated, we remind her and her counsel that mistaken judgment, ignorance of the law, or personal belief with regard to what the law should be do not excuse and will not provide a defense to a subsequent sanctions motion. Thus, should plaintiff and/or her attorney again file any such pleadings or motions in the future, a motion for appropriate sanctions and an injunction will be gladly entertained at that time.

An order follows.

## APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED MARCH 20, 1998

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CIVIL ACTION

NO. 97-5981

RUTH S. KERNS, on behalf of herself and all others similarly situated

vs.

CORESTATES FINANCIAL CORP., Successor to MERIDIAN BANCORP, INC. Successor to the FIRST NATIONAL BANK OF ALLENTOWN

**ORDER**

AND NOW, this 20th day of March, 1998, upon consideration of Defendant's Motion to Dismiss Plaintiff's Complaint and for Sanctions and Plaintiff's Response thereto, and it appearing to the Court that this action is barred by the doctrine of *Res Judicata*, it is hereby ORDERED that the Motion to Dismiss is GRANTED, the Motion for Sanction is DENIED and Plaintiff's Complaint is DISMISSED with prejudice.

BY THE COURT:

s/ J. Curtis Joyner
J. CURTIS JOYNER, J.

## APPENDIX D — CLASS ACTION COMPLAINT TO THE UNITED STATES COURT OF APPEALS FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO.

97-CV-5981

RUTH J. KUHNS, on behalf of herself and all others similarly situated,

Plaintiffs

vs.

CORESTATES FINANCIAL CORP. successor to MERIDIAN BANCORP., INC. successor to THE FIRST NATIONAL BANK OF ALLENTOWN,

Defendant

COMPLAINT — CLASS ACTION

Ruth J, Kuhns, referred to hereafter in the singular as the Plaintiff, for herself, and for and on behalf of all persons similarly situated, the Plaintiff Class, referred to hereafter in the plural as the Plaintiff, (including her) , who are former and/ or present employees of Corestates Financial Corp. (Corestates and/or the Defendant) or its predecessors or subsidiaries, complain that Defendant in its capacity as the corporation and

Trustee which is the successor to Meridian Bancorp, Inc., (Meridian) , and also the successor to the former First National Bank of Allentown, (First National) , and they allege that the Defendant in breach of its contract, Exhibit 101 attached hereto and made a part hereof, did on or about January 1, 1997, nine months ago and on the first of each month thereafter, "take" more than $35,000,000 of funds from the Profit Sharing Trust Fund which is part of the employee benefit plan described below, and has appropriated the funds which it has "taken" for its own use and for the use of 15 other groups of people to pay Corestates' own obligations to fund the cost of more than 15 Pension plans, described below, for the benefit of other persons who are not and were not participants or beneficiaries in the Profit Sharing Trust Fund established and maintained for the exclusive benefit of the Plaintiff Class, and allege as follows:

## I. JURISDICTION ALLEGATIONS

1. This Court has jurisdiction of and over the subject matter of the claims asserted herein by the Plaintiff Class and of and over the person of the Defendant by reason of the provisions of §§502(e)(1) and (2) , 29 USC §§1132(e)(1) and (2) , of the Employee Retirement Income Security Act of 1974, 29 USC §§1001, *et seq.*, (ERISA), in that the claims asserted herein by the Plaintiff Class are based upon and arise out of the conduct of an employer as such, (who is also the Trustee), the Defendant and/or its predecessors, and are claims which are related to employee benefit plans under ERISA, as specified below. The Plaintiff Class (the Plaintiffs) in this class action consists of persons who were employees of the First National Bank of Allentown (First National), a predecessor of the Defendant Corestates, and are and were Participants in the Retirement Plan established for their exclusive benefit by First National as their

employer, the Profit Sharing Plan (Exhibit 101) attached hereto and hereafter frequently referred to as the Profit Sharing Plan. (The Profit Sharing Plan established and maintained by the First National Bank of Allentown included employees of that Bank who had been employees of Saucon Valley Trust Company, and Participants in the Saucon Valley Trust Company Profit Sharing Plan prior to the merger of those two Banks and the merger of the Profit Sharing Plans of those two Banks; those persons became Participants in the Profit Sharing Plan of the First National Bank of Allentown, and are part of the Plaintiff Class.) The named Plaintiff is now retired under a Pension Plan maintained by the Defendant or one of its predecessors. The persons who were Participants in the Profit Sharing Plan established and maintained by the First National Bank of Allentown are the persons who are listed on the schedule appended hereto as Exhibit 102 and incorporated herein by reference thereto; some of them have not retired; their number exceeds 200, and it is therefore impracticable to bring all of them individually before the Court in one lawsuit. The First National Bank of Allentown was a national banking association prior to its merger into Meridian Bank, with its principal office located at Center Square, Allentown, PA, within this District, and all members of the Plaintiff Class were Participants in its Profit Sharing Plan which was administered at the principal office of such Bank in Allentown, PA, and is now administered as part of the Pension Trust of the Defendant, or consolidated therewith, at the administrative offices of the Defendant in Philadelphia PA, or in offices in Reading, PA and Allentown, PA, all within this District. The Plaintiff Class does not include all Participants in the Pension Plan of Corestates (the Defendant) , but only those persons who were Participants in the Profit Sharing Plan established and maintained by the former First National Bank of Allentown.

*Appendix D*

2. The Jurisdiction Allegations set forth above are incorporated herein by reference thereto, and this Court has jurisdiction of the claims asserted by the Plaintiffs under the supersedure provisions of §514(a), 29 U.S.C. §1144(a), of ERISA, which claims relate to an employee benefit plan under ERISA as specified below.

## II. GENERAL ALLEGATIONS

3. On or about the 1st day of January, 1984, (13 years ago) the First National Bank of Allentown through a corporate transaction, the terms of which are not relevant to this proceeding except as hereinafter specified, was acquired by and merged into Meridian Bancorp., Inc. or a wholly-owned subsidiary thereof (hereafter "Meridian"), a predecessor of Corestates (the Defendant).

(a) Meridian thereby became the successor to First National.

(b) Meridian, as the surviving banking institution in the merger with the First National Bank of Allentown, and as the successor Trustee under the First National Profit Sharing Plan (Exhibit 101) "took" (its own word) for its own use all of the assets of the Profit Sharing Plan and Trust which were impressed with the trust as set forth in the Retirement Plan referred to above, and thereby assumed liability of all of the duties and obligations of a trustee under such Agreement.

4. On a date sometime in 1996 Corestates acquired control of Meridian and reportedly merged it into itself (Corestates) or a wholly-owned subsidiary of itself, and acquired control of the Profit Sharing Plan and/or the Trust accompanying it, and remains in control of the Plan and Trust to this date.

*Appendix D*

(a) Corestates as the Trustee/Employer/Bank in control of the Plan and Trust has "taken" or paid over to itself as Trustee, and as trustee for the benefit of a group of 15 (or more) pension trusts (described below) maintained by it for persons who are employed by it or subsidiaries of it, which persons were not employees of First National when the Profit Sharing Trust was funded by First National for the exclusive benefit of its employees or beneficiaries designated by them, the members of the Plaintiff Class; the amount so "taken" on or about January 1, 1997 and repeatedly taken each month thereafter is a sum of more than $35,000,000.

5. The Plaintiffs (the members of the Plaintiff Class) now and at all times mentioned or material to the claims asserted herein have resided either in the City of Allentown, PA, or in its close environs, and performed their services for the First National Bank of Allentown, a predecessor of Meridian and of the Defendant in that City, and such employment and participation in its Retirement Plan have given rise to their claim against the Defendant.

(a) The benefits provided by the Profit Sharing Plan were part of the compensation to the members of the Plaintiff Class for services they rendered to First National, the Bank/Trustee/ Employer, during their many years of employment after the Plan was established; as compensation their benefits cannot be unilaterally withdrawn from them by the Bank/Employer/ Trustee.

6. This is not an action which would be subject to arbitration under local Rule 8 because the amount in controversy, with interest, is in excess of $35,000,000; at this time the nature of the damages being sought is compensatory.

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7. The Exhibits accompanying this Complaint are

(a) Documents which upon request were all provided by the Defendant or its predecessors to Harry A. Dower, Esquire, counsel for Ruth J. Kuhns, the named Plaintiff, and for the Plaintiff Class, and are

(b) True and correct copies of the Plans, Agreements, Trust Agreements they purport to be, and are

(c) Relevant and material to the claims made in this Complaint, and are binding on the Defendant, and are

(1) The only employee benefit plan or agreement which is relevant and material to the allegations made herein by or on behalf of the Plaintiff Class, and

(d) It is believed and therefore it is alleged that the facts stated therein by the Defendant or its predecessors are true and correct, and are

(e) Incorporated herein by reference,

## III. CLASS ACTION ALLEGATIONS PURSUANT TO RULE 23, FEDERAL RULES OF CIVIL PROCEDURE

8. (a) The allegations set forth everywhere in this Complaint are incorporated in every section or group of allegations seeking the relief or judgment requested or demanded.

(b) The Plaintiff has been informed and believes and on such information and belief alleges that many of the individual

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Class Members have accrued only relatively small benefits in such Retirement Plan and that their individual loss and potential recovery is and will be so modest in relation to the cost of enforcing the same that each of such persons is effectively precluded from individually litigating his or her claim asserted herein and will not have his, her, or their day in Court unless this action is allowed to be prosecuted and tried as a class action pursuant to and as provided by Rule 23 of the Federal Rules of Civil Procedure.

9. As provided in Rule 23 (b) (1) the prosecution of separate actions by the more than 200 individual Class Members, even if possible, would create a risk of (A) inconsistent or varying adjudications with respect to individual Class Members against the Defendant and which would establish incompatible standards of conduct for the Defendant, or (B) adjudications with respect to individual Class Members which would, as a practical matter, be dispositive of the interests of the other Class Members not parties to the adjudications or which would substantially impair or impede the ability of the Class Members to protect their interests.

10. As set forth in detail below there are substantial questions of law and fact common to the claims of each of the Class Members against the Defendant. The questions of law governing and dispositive of the named Plaintiff's claims against the Defendant are the same as the questions of law governing and dispositive of the claims against the Defendant of each Class Member. Except as to the questions of the amount of the retirement benefits accrued, or due each Class Member (including the named Plaintiff) and the correlative loss thereon, and the time, period and method of paying the same, the questions of fact governing and dispositive of the named

Plaintiff's claims against the Defendant, are the same as the questions of fact governing and dispositive of the claims of each Class Member against the Defendant.

11. (a) The claims of the named Plaintiff herein are typical, in all material respects, of the claims of each and all of the Class Members and are based upon and arise out of the same relevant fundamental facts constituting the unlawful conduct of the Defendant and/or its predecessors.

(b) According to the Table attached to Exhibit 102, incorporated herein by reference, showing the names of the Participants in the Profit Sharing Plan as of January 1, 1971, the amount of the accrued benefits due them as of that date, the numerical average accrued benefit of the individual members of the Plaintiff Class, which was, as pleaded herein, wrongfully appropriated for the use of the Defendant and/or its predecessors and is now being used by the Defendant to pay pensions under its Pension Plan to other persons who are or were not members of the First National Profit Sharing Plan, is approximately $175,000.

(c) The named Plaintiff is the person who primarily organized and performed the services of assembling the Plaintiff Class and previously solicited contributions for an expense fund for this Class Action from many of the persons shown on the Table attached hereto, and received such contributions from 46 persons for this purpose,

(d) The named Plaintiff engaged Harry A. Dower, Esquire an active practitioner of law and member of the Bar of this Court, as counsel for the Plaintiff Class; he has a half century experience practicing law in which he has spent a majority of

his time in the field of pension law; he has also been active as an adjunct professor of law in the Graduate School of the College of Business of Lehigh University.

(e) It is therefore alleged that the named Plaintiff is an adequate representative of the Plaintiff Class.

12. In addition the Plaintiff will fairly and adequately represent the interests of the Class and the individual Class Members because, by reason of the similarity or identity of the claims of the Plaintiff and the individual Class Members, the successful assertion of Plaintiff's claims herein will necessarily establish determinations of fact and law adequate to prove the liability of the Defendant to each Class Member.

13. (a) The questions of law and fact common to the claims of all Class Members against the Defendant predominate over questions, if any, affecting only individual members and a class action is superior to other available methods, if in fact any such other methods are available, which Plaintiff denies, for the fair and efficient adjudication of the matters alleged herein.

(b) The allegations set forth in paragraph 5 above are incorporated herein. As a consequence of the residence of the members of the Plaintiff Class, and the place where most of them now reside, and because the principal place of business of the First National Bank of Allentown (a predecessor of the Defendant) was at 7th and Hamilton Streets, Allentown, PA, where many of the actions of which Plaintiffs complain took place, and the remainder of them took place at offices of Corestates either in Philadelphia, or Reading, or Allentown, PA, it is desirable to concentrate the litigation of the claims in the Eastern District of Pennsylvania.

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14. The named Plaintiff, that is, Ruth J. Kuhns, sought review of her claim for retirement benefits within the claim review procedures established by Meridian, and such review was held, and many of the issues raised in this Complaint were involved in that claim review relating to the refusal to pay the benefits due or accrued to her, the benefits were denied. Early in this year (1997) a written proposal was made to the Defendant to settle the claims of the Plaintiff Class was made on behalf of the Plaintiff Class but such proposal was peremptorily rejected. The Plaintiff Class has been informed of such rejection and it is believed and therefore alleged that the Defendant would continue to adhere to the decisions already made by it and that therefore it would be futile for all 200 of the members of the Plaintiff Class individually to seek identical claim reviews under the Pension Plan for the relief which is sought in this Complaint, only to have such claim denied again. Because of this obduracy the Plaintiffs as a Class, or individually, are excused from the futility of trying to exhaust their plan administrative remedies.

COUNT I

PROFIT SHARING BENEFITS

A. VESTING

15. Effective as of January 1, 1985, Meridian Bancorp, Inc. adopted the Meridian Bancorp, Inc. Employees' Retirement Plan (Meridian Retirement Plan) by amending and restating what had been its Employees' Retirement and Benefit Plan, including merging The First National Bank of Allentown Pension Plan into the new Meridian Retirement Plan; among the Participants of the new Meridian Retirement Plan were the

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Participants in the original First National Profit Sharing Plan and the First National Pension Plan; after the merger of Meridian and Corestates the members of the Plaintiff Class were informed that they were now members of the Corestates Retirement Plan; after all the amending of the Retirement Benefit Plans (and the Trust Agreements which are parts of those Plans), it is still the vested interests in the original Profit Sharing Plan which have been "taken", now by Corestates, to pay retirement benefits to persons who were not participants in the Profit Sharing Plan, as described below, and which the Plaintiff Class is seeking to recover.

16. (a) The interests of the Participants who are members of the Plaintiff Class in the Profit Sharing Plan (Exhibit 101) established by First National, pursuant to the provisions of Article IV, Section 1 thereof, pages 7 and 8, became fully vested in them after years of employment with the First National Bank as specified therein.

(i) The Profit Sharing Plan (Exhibit 101) , in Article II, Section 4, at page 3, provides that after the transfer of any contributions by the Bank to the Trust Fund, ". . . all interests of the Bank therein shall terminate, and no part thereof, or income therefrom, shall be used for or diverted to purposes other than for the exclusive benefit of the participants and their contingent beneficiary or beneficiaries. . . ."

(ii) All of the interests of the Participants in the Profit Sharing Plan having become fully vested, and the interests of First National or its successors in the assets of the Profit Sharing Fund (to the extent it had any) having terminated, the Bank, and its successors right up to Corestates, could not, according to the terms of the Agreement, transfer such assets to anyone

except the Participants, and specifically not to or for the use of 15 other Pension Plans.

17. The Meridian Retirement Plan, referred to above, provides in Article III, Sec. 3.18, after referring to the Profit Sharing Accounts of the Participants in the former First National and Saucon Valley Profit Sharing Trusts, states in subparagraph (a):

"(a) A participant shall be fully vested in his or her Profit Sharing Account."

18. On or about January 1, 1971, First National adopted a Pension Plan for its employees, and the members of the Plaintiff Class, and their beneficiaries, are participants in that Pension Plan.

(a) In Article IV, Section 4.1, after referring to a "Member" of the Pension Plan who was previously a Participant in the First National Profit Sharing Plan whose Profit Sharing Account was transferred to the Pension Trust, it is stated:

"(A) The said Profit Sharing Account of each former Participant of the Profit Sharing Trust shall be fully vested in him at all times.

19. The Meridian Retirement Plan, referred to above, Exhibit 8, in Article III, Section 3.18, at pages 31 and 32, after referring to the Profit Sharing Accounts of the Participants in the former First National and Saucon Valley Profit Sharing Trusts, states in subparagraph (a):

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"(a) A Participant shall be fully vested in his or her Profit Sharing Account."

B. EXCLUSIVE BENEFIT

20. *Employers' Contractual Obligations.*

(a) Under the Profit Sharing Plan, Exhibit 101, in Article VII, Paragraph 6, p. 18, it is stated, "6. During the existence of this Trust, or in the event of termination or liquidation of same, no part of the corpus or income of this Trust shall be used for, or diverted to purposes other than for the exclusive benefit of the participating employees of the Bank or their beneficiaries; and further, no portion of the corpus or income therefrom of this Trust shall at any time revert to the Bank."

(b) In addition, paragraph 8 of the same article in the Profit Sharing Trust states, "8. Subject only to the power of amendment, as set forth above, this Trust is declared to be and shall be irrevocable, and it shall continue in operation and effect until the Trustees shall have fully distributed all assets entrusted to it to the Participants, or contingent beneficiaries, of this Trust in accordance with the terms thereof."

(c) For the reasons stated below the provisions of the IRC relating to employee benefit plans which are beneficial to employees (the members of the Plaintiff Class) the relevant provisions of IRC §§401(a), 501 (a), 404(a)(1), and 404 (a) (3) have become implied contractual obligations of the Defendant to the Participants in the Profit Sharing Plan which is the subject of this litigation.

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(d) *Employers' Statutory Obligations.*

ERISA, which was enacted on September 2, 1974, has provided and continues to provide statutory obligations in

(i) §403(c), 29 USC §1103(c), that the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

(ii) Further, §404(a), 29 USC §1104(a) provides as follows:

"*Prudent man standard of care.*

(1) ". . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

"(A) for the exclusive purpose of:

"(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the Plan;

21. Due to the "Exclusive Benefit" provisions of the Plan, but particularly those stated in Exhibit 101, Article VII, paragraph 6, at p. 18, and the "Irrevocability" provisions of paragraph 8 of the same Exhibit and Article, the Bank had no power to transfer the assets of the Profit Sharing Trust to the

Corestates Pension Trust to be used to fund the pension benefits to be paid by Corestates or its Pension Trust to 15 other groups of persons who were not ever participants in the Profit Sharing Plan (Exhibit 101) established for the numbers of the Plaintiff Class; the 15 other groups are members of the pension plans referred to by Corestates in its annual Report of the Retirement Plan for the year ending December 31, 1995 on Form 5500 filed with the U.S. Department of the Treasury and the U.S. Department of Labor on pages SI-16, SI-17, and SI-18 (portions of the Actuarial Information), particularly paragraph 2, subparagraphs (b) through (p), copies of which pages are attached hereto as a group as Exhibit 103, and incorporated herein.

(a) Transferring the more than $35,000,000 of assets vested in the Members of the Plaintiff Class, and being held for their exclusive benefit, to or for the use of Corestates or its Pension Trust, and/or for the benefit of the 15 other groups referred to herein, was a breach of the contract, Exhibit 101, and contrary to law, ERISA Sec. 1103(c)(1) , since those assets were and are inuring to the benefit of Corestates, the employer.

22. The orders of this Court and of the United States Court of Appeals for the Third Circuit granting and affirming the Motion for summary judgment on the Counts of a Complaint filed in a previous lawsuit partly in reference to this matter, (but did not and could not include the "taking" of the Plan assets to fund 15 other Plans because this "taking" had not yet occurred), which Court orders were based on the limitation of action provisions of ERISA and based on laches, did not extinguish the rights of the Plaintiff Class to their vested interests in the Profit Sharing Plan, and such rights remain vested in them, particularly those accruing after the date of the

Complaint in the other lawsuit, and the Court orders issued in reference to it.

(a) The Court orders referred to above apply only to the time of bringing suit, according to the decisions of the Supreme Court of the United States cited below, but they did not affirm the legality of the "taking" of the assets of the Plan by the Defendant Trustee/Bank for its own use, nor vitiate the contractual, or the statutory and regulatory requirements that the assets in both of such Plans shall "never inure to the benefit of any employer" and shall be held for, and administered for, the "exclusive purposes" of paying benefits to the Plaintiff Class and expenses of the Plan; that is, ". . . [t]he statute of limitations does not destroy nor pay the debt . . .", *Campbell v. Holt,* (1885), 115 U.S. 620, 6 S. Ct. 209, (at p. 211); and in *Chase Securities Corporation v. Donaldson,* (1945), 325 U.S. 896 65 S. CT. 1137 the Supreme Court stated, "[T]his Court, in *Campbell v. Holt,* adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights." (at 65 S. Ct. 1142).

(b) Whatever remedy was tine-barred by the decisions of this Court and the Third Circuit on the pleas of the Defendant Trustee/Bank based on the 3 year or 6 year limitation of actions provisions of ERISA and on laches, are decisions which could not apply to a breach of contract or a breach of fiduciary duty occurring *after* the Court orders have been issued, breaches which are occurring today, even as this document is being read, because the Trustee/Bank in breach of its contract and in breach of its fiduciary duty is taking the $35,000,000 from the Plaintiff Class and using it for its own purposes at this instant, as it did one minute ago, one week, one month, or one or three years ago; no statute of limitations, and no rule against laches, can bar seeking a remedy in an action brought so promptly as this.

(c) These matters, because of the time they occurred, have not been litigated before.

23. At least $30,000,000, or a sum in excess thereof, approximately 85% of the trust funds held for the exclusive benefit of the Plaintiff Class, are funds which way never inure to the benefit of the Defendant, Corestates, the Trustee/Bank, nor to any of its predecessors, which trust funds the Defendant has "taken" from the Plaintiff Class, are being used by the Defendant for itself to pay or fund its own obligation under other contracts for the benefit of other persons who were never employed by First National, and who are not and never can become members of the Plaintiff Class; that is, in excess of $30,000,000 or 85% of the vested interests, have been "taken" by the Defendant and are being used to benefit itself and other persons who are not members of the Plaintiff Class who are persons who have no legal or equitable interest in such funds.

(a) The other $5,000,000, or approximately 15% of the $35,000,000 "taken" by the Defendant, the Trustee/Bank, is also not being used for "the exclusive benefit" of the Plaintiff Class, but is being used by the Defendant for itself to satisfy its own contractual and statutory obligation to fund the cost of the Pension Plan established and maintained by it for all its employees including the members of the Plaintiff Class, contrary to the "exclusive benefit" provisions of the Profit Sharing Plan, and of Treasury Regulation Sec. 1.401-1(b)(3), and of Rev. Rul. 69-295.

24. The $35,000,000 "taken" by the Defendant Trustee/ Bank does not and cannot belong to it, the Defendant Trustee/ Bank, but belongs only to members of the Plaintiff Class and must be paid to them alone in addition to their pension benefits under the separate pension plan.

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(a) The $35,000,000 shall never inure to the benefit of the Defendant, Corestates, in any of its capacities, and shall be held and distributed and used exclusively for the payment of benefits to the Plaintiff Class and to pay the reasonable expenses of administering the Plan including the payment of their reasonable attorney's fees and expenses.

(b) No part of the corpus or income of the Profit Sharing Plan has been escheated by the Trustee/Bank to the Commonwealth of Pennsylvania.

(c) No order of any court, nor of any administrative agency, nor of any governmental authority, nor any agreement, nor any action or inaction of any members of the Plaintiff Class, in short, no one and not any thing, divested the fully vested beneficial interests of any member of the Plaintiff Class in the Profit Sharing Plan, and since those beneficial interests have not been distributed to them they remain in force and effect; it is the payment of those beneficial interests which is being demanded in this action, and the Profit Sharing Plan and Trust remain in full force and effect. (Sec. 6.2 of the separate Trust Agreement accompanying the Plan provides that the Trust Agreement shall continue in effect ". . . [u]ntil the Trust Fund has been distributed by the Trustee as directed by the Committee . . ." designated to administer the Fund. )

25. Under the provisions of ERISA, 29 USC Sec. 1132(h), a copy of the Complaint in an action under ERISA seeking relief as sought in this Complaint is required to be ". . . [s]erved upon the secretary [of Labor, as defined in ERISA, 29 USC Sec. 1002(13)] and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, . . ."

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(a) Neither ERISA nor any regulation provides who shall "serve" the copy of the Complaint on either or both of the Secretaries in a case of this kind.

(1) A copy of this Complaint (and other related papers) is being served by the Plaintiff Class by certified mail on each of the Secretaries.

26. According to an informal annual Report made on or about November 27, 1996, by Meridian, the Defendant Trustee/ Bank and the predecessor of Corestates, it as Employer contributed $23,850 to the Employees Retirement Plan in the year ending December 31, 1995 (the last full year for which figures are available), but paid from ". . . the Plan $474,252 in administrative expenses and $5,243,090 in benefits . . ."; this contribution of $23,850 was 5% of the administrative expenses of the Plan and the other 95% was paid from the $35,000,000 vested in the Plaintiff Class as part of the $212,017,016 in total assets of the Plan held for the benefit of all ". . . 9,051 persons who were participants in or beneficiaries of the plan at the end of the plan year . . ." (1995).

(a) The $474,252 in administrative expenses was paid from the Employees Retirement Plan to the Defendant, or its predecessor, even though its total contribution to the Plan for the year was only 5% of the administrative expenses.

(b) After the payment of 5% of this administrative expense (which has a first priority of payment fram the Plan) the Defendant and its predecessors made no contribution to the Plan for anything, not even for the cost of past, present, or future retirement benefits accruing to or incurred for the 9,051 persons and their beneficiaries participating in the Corestates Plan, or the other 95% of the expenses of administering the Plan.

(c) All pension benefits which have been paid to the members of the Plaintiff Class by the Plan for all of the years for which a complaint is not time-barred by previous orders of this Court and the Third Circuit (the "open years") have been paid by contributions made years ago by the Defendant or its predecessor and the earnings in the Trust and the accumulations on them held for the "exclusive benefit" of the Plaintiff Class; no contributions have been made to the Plan in the "open years" by anyone to pay benefits to the participants in the Plan, and the liability of the Bank as employer to fund the cost of paying those benefits has been imposed by the Defendant Trustee/Bank on the $35,000,000 and the earnings on it in the Trust Fund belonging exclusively to the Plaintiff Class.

(d) All of the $35,000,000 "taken" by the Trustee/Bank members of the Plaintiff Class, as pleaded above, is payable from the Trust Fund to or for the benefit of the Plaintiff Class; their pension benefits, according to law, are payable from other assets in the Pension Plan,

27. A reasonable attorney's fee and expenses should to be awarded in this action, as permitted by law, to Harry A. Dower, Esq., attorney for the Plaintiff Class, for his services in this action, which fee should be one-quarter of the amount recovered for the Plaintiff Class, or such other amount as the Court shall determine, to be paid from the Trust Fund which has been enhanced by at least $35,000,000 by the services of the attorney for the Plaintiff Class, or the fee is to be paid by the Trustee/ Bank from its own resources, as the Court shall determine.

WHEREFORE, Ruth J. Kuhns individually and as representative of the Plaintiff Class prays that the Court declare that

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A. The Defendant, Corestates or its predecessor, Trustee/ Bank, has unlawfully "taken" more than $35,000,000, or such other sum as found by the Court, of funds which have been vested in the Plaintiff Class, from the Profit Sharing Retirement Trust established and maintained for their exclusive benefit, and direct that the Defendant shall pay such sum (less attorney's fees and expenses) to the members of the Plaintiff Class in direct proportion to each person's account balance in such Trust on December 31, 1970, within 10 days of the date of the Court's Order at the conclusion of this action.

B. The Defendant as Trustee of such Plan shall pay from the Trust Fund one-quarter of the amount recovered for the Plaintiff Class to Harry A. Dower, Esq., for legal services rendered by him in this action to the members of the Plaintiff Class, less any sums which may be paid to him from the same source before the conclusion of this action as Interim Allowances of Counsel Fees, and direct that he shall pay upon receipt of such attorney's fees all of the expenses incurred in producing the results of this litigation, including reimbursing the members of the Plaintiff Class for advances which they have deposited for expenses in this litigation, and for the services of the experts engaged to testify for the Plaintiff Class as required by the Court, and compensation to the members of the informal First Employees Committee for their services in managing this Class Action.

C. The Plaintiff Class shall have such other legal or equitable relief as the Court may deem just and appropriate.

And she and the Plaintiff Class will ever pray.

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s/ Harry A. Dower
Harry A. Dower
Attorney for Plaintiff Class
PA Atty. No. 08152
P.O. Box 950
Allentown, PA 18105
(610) 821-1116

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## PLAINTIFF'S EXHIBIT 101

### THE FIRST NATIONAL BANK OF ALLENTOWN EMPLOYEES PROFIT SHARING RETIREMENT TRUST

THIS TRUST AGREEMENT made this 22 day of Dec 1954 by and between THE FIRST NATIONAL BANK of ALLENTOWN, Allentown, Pennsylvania (hereinafter called the "Bank"), the party of the first part, and JOHN C. SCHUMBERGER, SR, Trustee, HENRY H. DENT, Trustee, and EDWIN K. KLIMM, JR., Trustee (hereinafter called the "Trustees"), party of the second part.

The purpose of this Trust is to supplement the Federal Social Security Act and provide retirement benefits for employees who have performed loyal and faithful service. The Bank shall have power to modify any of the provisions of this Plan for the purpose of complying with any requirements of future legislation exempting employers with acceptable Pension Plans or Profit Sharing Plans from compulsory contributions to a State or Federal Fund.

WHEREAS, such Plan provides for the establishment of a Trust into which contributions by the Bank may be made for the purpose of distributing to such employees, their beneficiaries, or their estates, the corpus and income of the Fund accumulated in the Trust in accordance with such Plan;

NOW THEREFORE, this Agreement withnesseth:

That in order to carry such Plan into effect, the parties hereto agree as follows:

The effective date of this Plan is November 5th, 1954.

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ARTICLE I

COVERAGE AND ELIGIBILITY REQUIREMENTS

1. All employees previously participating in the Employees' Profit Sharing Retirement Trust, established for their benefit by the Allentown National Bank and the Second National Bank of Allentown, which Banks through consolidation have formed The First National Bank of Allentown, and have continued in the employ of The First National Bank of Allentown are eligible to participate in this Plan on the adoption date hereof.

2. Employees previously ineligible to participate in either of the foregoing Plans, due to lack of service required under either Plan, will have such prior service recognized and become eligible to participate in this Plan on the January 1st following the completion of two (2) full years of service with this Bank, and either of the above named Banks.

3. All employees engaged in the future will become eligible on the January 1st, following the completion of two (2) full years of service with this bank.

ARTICLE II

CONTRIBUTIONS

1. As soon as it is practicable, beginning with the year ending December 31st, 1954, the Board of Directors shall ascertain the employees then qualified to participate hereunder, and shall determine the amount of the net profits of the Bank to be allocated to this Trust for the exclusive future benefit of

employees or their contingent beneficiary or beneficiaries, but no allocation for any year shall exceed fifteen (15%) per cent of the aggregate compensation of all employees participating in the Plan for any such year.

2. The amount of net profits to be allocated for transfer to the Trust shall equal an amount computed as follows:

The lesser of the following amounts:

1. Fifteen (15%) per cent of the aggregate annual compensation of all employees participating in the Plan for such year, or

2. The total income of the Bank subject to Income Taxes plus income exempt from Income Taxes in excess of the amount necessary for a dividend of ten (10%) per cent and an addition to Undivided Profits of 1% of Capital, Surplus and Undivided Profits at the close of the preceding year.

3. No further contributions shall be made by the Bank for any participant after he or she has actually retired, nor shall any such participant thereafter share in any forfeitures as described under Paragraph 6 of Article IV.

4. Upon the transfer by the Bank of any money or assets to the Trust, all interests of the Bank therein shall terminate, and no part thereof or income therefrom shall be used for or diverted to purposes other than for the exclusive benefit of the participants and their contingent beneficiary or beneficiaries as herein provided.

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5. Employees shall not be required to make contributions to the Trust.

ARTICLE III

ALLOCATION OF CONTRIBUTION

1. The allocation of the contribution for any year or years shall be in accordance with the following formula:

> To each participant's Separate Trust Account shall be credited that ratio of the annual contribution to the Trust which the annual basic compensation of such participant bears to the total annual basic compensation of all the participants.

Annual basic compensation of a participant shall include only regular compensation and overtime, and shall exclude bonuses for the purpose of the foregoing formula.

2. Forfeitures, as provided in Article IV, Paragraph 6 shall be allocated annually to the separate Trust Accounts of the eligible non-forfeiting participating employees in the ratio said individual Trust Account bears to the aggregate of said Trust Accounts at the preceding December 31st. The Trust Accounts of returned, deceased or terminated employees shall not participate in the allocation of forfeitures.

3. Earnings or Losses of the Fund for any year shall be allocated to all individual Trust Accounts, including retired, deceased and terminated employees, in the ratio of the individual Trust Account bears to the aggregate of the Trust Accounts at the current year end and prior to the allocation of contributions and forfeitures for the year then ending.

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4. The bank shall furnish to the Trustees a certified list of all participants for the calendar year 1954, and for each subsequent year, showing the exact amount to be credited to the account of each participant for such year. The Trustees may rely on such certified list and shall be under no duty or obligation to examine the records of the Bank to ascertain the correctness or accuracy thereof.

5. The Trustees shall maintain separate Trust Accounts in the name of each participant, and as of December 31st of each year, beginning with the year 1954, the Trustees shall credit to the account of each participant his share of:

The contribution by the Bank for such year, forfeitures from other participants' accounts for such year, and the net earnings of the Trust Fund for such year (defined as all gains, profits and income realized from the Trust Fund during such year, less all losses incurred in the administration of the Trust Fund in such calendar year). In computing gains and losses, the fair market value of Trust Assets at December 31st shall be used.

## ARTICLE IV

## VESTING

1. In the event of termination of employment due to resignation or discharge prior to retirement age, such participant or participant's beneficiary or beneficiaries shall be entitled to the following percentage of the total amount of such participant's separate Trust Account, or of the net cash surrender value of the portion of the contract or contracts on his or her

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life which was paid for by Bank contributions, and such percentage also of any remaining amount of such participant's separate account in the Trust on the date of termination of employment.

| *Vesting* | *Percentage* |
|---|---|
| If termination of employment occurs before three (3) full years of employment with the bank | "None" |
| If termination of employment occurs after three (3) full years but before four (4) full years of employment with the Bank | 10% |
| If termination of employment occurs after four (4) full years but before five (5) full years of employment with the Bank | 20% |
| If termination of employment occurs after five (5) full years but before six (6) full years of employment with the Bank | 30% |
| If termination of employment occurs after six (6) full years but before seven (7) full years of employment with the Bank | 40% |
| If termination of employment occurs after seven (7) full years but before eight (8) full years of employment with the Bank | 50% |
| If termination of employment occurs after eight (8) full years but before nine (9) full years of employment with the Bank | 60% |

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| *Vesting* | *Percentage* |
|---|---|
| If termination of employment occurs after nine (9) full years but before ten (10) full years of employment with the Bank | 70% |
| If terminaion of employment occurs after ten (10) full years but before eleven (11) full yearsof employment with the Bank | 80% |
| If termination of employment occurs after eleven (11) full years but before twelve (12) full years of employment with the Bank | 90% |
| If termination of employment occurs after twelve (12) full years of employment with the Bank | 100% |

2. The vesting provisions and percentages set forth above shall not be applicable in the following circumstances:

(a) Death of Participant — In such event, the entire amount of credit in such participants separate Trust Account at date of death shall be paid to the participants designated beneficiaries (as in the absence of such a designation to his legal representatives) in periodic installments and in such amounts over a period not to exceed twelve (12) years from date of death, as circumstances in the discretion of the Trustees justify.

(b) Vested Rights in Prior Trusts — Where terminating employees have vested rights in Trusts

established prior to the effective date of this Plan, the amount vested at the date of termination of employment shall be greater of the following:

1. The percentage vested by years of service in accordance with the provisions of the Trust Agreement as amended prior to the effective date of this Plan, plus, the amount vested by years of service rendered subsequent to the effective date of this Plan, in accordance with the provisions of Paragraph 1 above, or

2. The amount vested in accordance with the provisions recited in Paragraph 1 above, recognizing as "years of service with the Bank", years of service prior and subsequent to the effective date of this Plan.

(c) Retirement accelerated by reason of hardship, serious sickness or disability in accordance with Paragraph 5 of this Article IV.

3. Where termination of employment results from resignation or discharge, the amount of vested interest plus the future annual allocation of earnings or losses shall be paid when such participant reaches normal retirement age, as heretofore defined, and in the same manner as though such participant had remained in the Bank's employ and reached normal retirement age, and as set forth in Paragraphs 1 and 2 of this Article IV or the amount of vested interest as shown above may, in the discretion of the Trustees, be paid in periodic

installments and in such amounts as it shall determine. In the event death of such participant occurs prior to full distribution of the amount of such participant's vested interest, determined by the Vesting Percentage set forth above, the Trustees shall continue to make payments regularly to a designated beneficiary or beneficiaries, as heretofore, until said deceased participant's vested interest plus the annual allocation of earnings or losses is totally distributed or the undistributed balance remaining at death can be paid in one lump sum or periodic payments to such designated beneficiary or beneficiaries, as circumstances in the discretion of the Trustees deem most justified. Such payments, may in the discretion of the Trustees, be made either in cash or by assignment to the participant of a portion of such contract or contracts representing the equivalent of that amount, extending over a period of not more than twelve (12) years from date of initial payment.

4. Upon written advice of the Trustees from the Board of Directors of the Bank of defalcation or embezzlement by any employee, the entire amount of his or her interest in the Fund shall be forfeited.

5. Each participant shall have the right to designate his or her beneficiary or beneficiaries for the purpose of distributing any remaining balance due said participant from the Trust at the date of such participant's death. In the event a participant fails to designate a beneficiary or beneficiaries for the purpose of distributing any remaining balance due such participant from the Trust, at the date of such participant's death, the Trustees shall pay such remaining balance to the legal representative of such deceased participant.

6. The excess in the separate Trust Accounts of any participant or participants over their vested interests, due to

resignation or discharge, as set forth under Paragraph 1 of this Article IV or amounts of such forfeitures thus reverting to the Trust, shall be allocated yearly to the separate Trust Accounts of the remaining eligible participants in the manner described in Article III, Paragraph 2.

BENEFITS

1. Benefits or regular distributions shall commence in the case of male and female participants when such participants reach the age of sixty-five (65) years, which designated age shall be the normal retirement age for male and female employees, except as hereinafter provided.

2. Any participant upon reaching the required retirement age, and retired from the service of the bank, shall be entitled to the regular distribution of his or her fund, which regular distribution shall be as follows:

The total amount standing to the credit of the participant in the participant's separate Trust Account at retirement shall be divided by the life expectancy figure contained in Table I, attached hereto, opposite the age as to the nearest birthday of the employe at the time of retirement. The resulting amount shall be divided by twelve (12), and shall represent the amount of monthly retirement benefit payments to be made to the participant by the Trustees until the amount standing to the credit of the retired participant is entirely distributed. In no event, however, shall the monthly retirement benefit exceed two-thirds (2/3) of the monthly salary of the participant at time of retirement. If the amount to the credit of the retiring participant is insufficient to pay at least Twenty-five ($25.00) Dollars per month, he or she shall receive Twenty-five ($25.00)

*Appendix D*

Dollars a month until the amount to his or her credit is exhausted.

3. In the event death of a retired participant occurs prior to full distribution of such participant's fund, the Trustees shall continue to make payments regularly to a designated beneficiary or beneficiaries as theretofore, until said deceased participant's fund plus the annual allocation of earnings or losses os totally distributed, or the undistributed b

disability causing severance of employment. Retirement benefits shall then commence prior to normal retirement age and be paid in the same manner as though such participant had reached normal retirement age, but no further contributions shall be made by the Bank for any such participant after such earlier retirement date, nor shall such participant thereafter share in any forfeitures as described under Paragraph 6 of Article IV the amount of benefit payments being determined by the amount of such participant's separate Trust Account at such earlier date plus future annual allocation of earnings or losses. All employees shall receive equal consideration under the provisions of this paragraph.

6. Any participant may, with the consent of the Board of Directors of the Bank, continue in the service of the Bank after attaining his or her normal retirement age, and in such even, payment of such participant's retirement benefits shall not commence until the date such participant actually retires from the service of the Bank.

7. In the instance of any participant becoming eligible to receive retirement benefits, it is recognized that in certain cases, due to then existing and prevailing circumstances, the needs of such retired participant would best be served by periodic payments other than the regular payments as provided for in the Plan; therefore, the Trustees are authorized in such cases to make such periodic payments as would best suit the needs of such participant, the total of which shall be limited to the amount in the separate Trust Account of such participant at his or her retirement date, plus the annual allocation of earnings or losses. All employees shall receive equal consideration under the provisions of this paragraph.

8. The Trustees are likewise authorized, at any time, to apply any participant's fund or any part thereof, to the purchase of an annuity contract, to be of such kind and character as the Trustees may determine as most advisable for the particular participant and his or her beneficiary or beneficiaries. The Trustees shall be the complete and absolute owner of the annuity contracts held in this Trust, and shall have the power to sell or assign any such contract.

## ARTICLE VI.

## ADMINISTRATION

1. This Trust shall be administered by Trustees to be appointed by the Board of Directors of the Bank.

2. The Trustees of this Fund shall be three (3) in number. The initial Trustees and their terms of office shall be as follows:

| *Name* | *Term of Office* |
|---|---|
| John C. Shumberger, Sr. | 5 Years |
| Henry H. Dent | 5 Years |
| Edwin K. Kline, Jr. | 5 Years |

3. Two (2) Trustees shall constitute a quorum for the transaction of business, and any trustee can be removed by the Board for incapacity, inactivity or other reasonable cause. Vacancies in the office of Trustee caused by resignation, incapacity, death or expiration of term shall be filled by the Board of Directors of the Bank.

4. The Trustees shall have power, in their discretion, to retain in the form in which they may exist at the time of their transfer to the Trustees, any stocks, bonds, real estate, securities, or investments transferred to the Trustees in satisfaction of any obligations under this Agreement.

5. The Trustees shall have power to invest and reinvest amounts transferred to the Trust, revise, alter, vary, change and exchange investments and reinvestments from time to time, without being limited to investments legal for Trust Funds under the Laws of the Commonwealth of Pennsylvania.

6. Title of Trust Assets shall be vested in the Trustees. However, the Trustees shall have the power to take title to securities in the name of a nominee or nominees to be selected by the Trustees to simplify and facilitate the transfer of such securities.

7. All successor Trustee shall succeed to all the rights, titles, interests, powers, discretions and duties vested in the original Trustees by the terms hereof.

8. The Trustees shall have full power to adopt by-laws and such rules and regulations, from time to time, as may be deemed necessary to perform properly the duties and carryout the purpose and intention of this Plan.

9. The Trustees shall have power to modify any of the provisions of this Plan, if necessary, to satisfy the Director of Internal Revenue.

10. In the event that any dispute arises over the interpretation of any of the provisions of this Plan, the decision of the Trustees shall be final.

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## ARTICLE VII.

### GENERAL

1. In the event that any provision of this Plan be construed, for any reason, to be invalid or not in conformity with the U.S. Internal Revenue Laws, such provision shall not impair the validity of the remaining provisions, and the Plan shall be construed in the same manner as if the non-conforming or invalid provision had never been included herein.

2. The Bank shall have the right to amend this Agreement and the Trust hereby created at any time, and from time to time, to any extent that may be deemed advisable and necessary, subject to approval by the Director of Internal Revenue. However, no amendment, under any circumstances, may be adopted the effect of which will be (a) to vest in the Bank any interest in the assets of the Trust of any part thereof, or (b) to divest any participant or contingent beneficiary or beneficiaries of his or her interest therein, or (c) to give any participant or contingent beneficiary or beneficiaries any assignable or exchangeable interest in said Trust in advance of the distributions now or hereafter provided for hereunder.

3. The Bank may, at any time, determine that it will not, after the date of such determination, further appropriate net earnings of the Bank for transfer to the Trustees. In such event the Bank shall forthwith notify the Trustees in writing of such determination. Upon receipt of such notice, the Trustees, in its sole discretion, may (a) pay to the individual participants not yet retired the amount remaining outstanding to their credit in the same manner as set forth under Paragraph 2 of Article V or at such time and in such amounts as the Trustees shall determine, until the entire amount to the credit of each

participant has been expended, without regard to "Vesting" provisions contained in Paragraph 1 of Article IV, and in the instance of retired participants continue the Trust until all distributions have been made in the regular manner as set for the above or (b) at any time, and from time to time thereafter, distribute in cash or in property, or both to some of the participants, or others entitled thereto, their proportionate share of the Trust Assets, and retain the balance of the Trust Assets for the benefit of the remaining participants or their beneficiaries.

4. In event the Bank should reorganize, merge or consolidate with any other banking company having or proposing to create an Employees' Profit Sharing Retirement Trust or any comparable employees retirement trust recognizing a vested interest of the employees, the Trustees are authorized to accept the corpus and income of the merging banks Trust Funds or to transfer the corpus and income of its own Trust Fund for consolidation with the Employees' Trust Fund of the consolidated banking company providing only that the rights, privileges and vested interest of the individual participants remain unchanged by said transfer. In event this requirement is not met, the Trustees will proceed in accordance with the provision of Paragraph 3 of Article VII.

5. The Bank shall pay all of the regular administration expenses of this Trust.

6. During the existence of this Trust, or in the event of termination or liquidation of same, no part of the corpus or income of this Trust shall be used for, or diverted to purposes other than for the exclusive benefit of the participating employees of the Bank or their beneficiaries; and further, no

portion of the corpus or income therefrom of this Trust shall at any time revert to the Bank.

7. No participant, beneficiary or contingent beneficiary shall have the power to assign, hypothecate or transfer any interest or rights to which he or she may be entitled under the provisions of this Agreement. The interest or rights of any participant, beneficiary or contingent beneficiary shall to the fullest extent permitted by law, be free and clear of his or her debts, contracts, engagements, alienations and anticipations, and shall not be liable to levy, attachment, execution or sequestration or claims or any kind of any assignee or alienee thereof.

8. Subject only to the power of amendment, as set forth above, this Trust is declared to be and shall be irrevocable, and it shall continue in operation and effect until the Trustees shall have fully distributed all assets entrusted to it to the participants, or contingent beneficiaries, of this Trust in accordance with the terms thereof.

IN WITNESS WHEREOF, the parties hereto have executed or caused these presents to be executed, the day and year first above written.

*Appendix D*

THE FIRST NATIONAL
BANK OF ALLENTOWN
Allentown, Pa.

by Frank M. Cressman
President

(SEAL)

ATTEST:

s/ [illegible]
Cashier

ACCEPTANCE BY TRUSTEES

Witnessed by:

| | |
|---|---|
| s/ LaRue D. Gartner | s/John C. Schumberger, Sr. |
| s/ Bernice A. Morgan | s/ Henry H. Dent |
| s/ Ruth E. Rabinold | s/ [illegible] |

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## LIFE EXPECTANCY TABLE

| *Age* | *Life Expectancy* |
|---|---|
| 35 | 32 Years |
| 36 | 32 |
| 37 | 31 |
| 38 | 30 |
| 39 | 29 |
| 40 | 29 |
| 41 | 28 |
| 42 | 27 |
| 43 | 26 |
| 44 | 26 |
| 45 | 25 |
| 46 | 24 |
| 47 | 24 |
| 48 | 23 |
| 49 | 22 |
| 50 | 21 |
| 51 | 21 |
| 52 | 20 |
| 53 | 19 |
| 54 | 19 |
| 55 | 18 |
| 56 | 17 |
| 57 | 17 |
| 58 | 16 |
| 59 | 15 |
| 60 | 15 |
| 61 | 14 |
| 62 | 13 |

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| *Age* | *Life Expectancy* |
|---|---|
| 63 | 13 |
| 64 | 12 |
| 65 | 12 |
| 66 | 11 |
| 67 | 10 |
| 68 | 10 |
| 69 | 9 |
| 70 | 9 |
| 71 | 9 |
| 72 | 8 |
| 73 | 8 |
| 74 | 7 |
| 75 | 7 |
| 76 | 6 |
| 77 | 6 |
| 78 | 6 |
| 79 | 6 |
| 80 | 5 |
| 81 | 5 |
| 82 | 5 |
| 83 | 4 |
| 83 | 4 |
| 84 | 4 |
| 85 | 3 |

## APPENDIX E — STATUTORY PROVISIONS INVOLVED

**29 USC §1002**

For purposes of this title:

* * *

(23) The term "accrued benefit" means —

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 204(c)(3) [29 USCS § 1054(c)(3)], expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

The accrued benefit of an employee shall not be less than the amount determined under section 204(c)(2)(B) [29 USCS §1054(c)(2)(B)] with respect to the employee's accumulated contribution.

**29 USC §1043. Minimum vesting standards**

**(a) Nonforfeitability requirements.** Each pension plan shall provide than an employees' right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

* * *

(B) A plan satisfies the requirements of this subparagraph if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

| Years of service: | The nonforfeitable percentage is: |
|---|---|
| 3 | 20 |
| 4 | 40 |
| 5 | 60 |
| 6 | 80 |
| 7 or more | 100. |

**29 USC §1082. Minimum funding standards**

**(a) Avoidance of accumulated funding deficiency.** (1) Every employee pension plan subject to this part shall satisfy the minimum funding standard (or the alternative minimum funding standard under section 305 [29 USC §1085]) for any plan year to which this part applies. A plan to which this part applies shall have satisfied the minimum funding standard for such plan year if as of the end of such plan year the plan does not have an accumulated funding deficiency.

(2) For the purposes of this part, the term "accumulated funding deficiency" means for any plan the excess of the total charges to the funding standard account for all plan years (beginning with the first plan year to which this part applies) over the total credits to such account for such years or, if less, the excess of the total charges to the alternative minimum funding standard account for such plan years over the total credits to such account for such years.

* * *

**29 USC §1082**

**(b) Funding standard account.** (1) Each plan to which this part applies shall establish and maintain a funding standard account. Such account shall be credited and charged solely as provided in this section.

(2) For a plan year, the funding standard account shall be charged with the sum of —

(A) the normal cost of the plan for the plan year,

(B) the amounts necessary to amortize in equal annual installments (until fully amortized) —

(i) in the case of the plan in existence on January 1, 1974, the unfunded past service liability under the plan on the first day of the first plan year to which this part applies, over a period of 40 plan years,

* * *

(3) For a plan year, the funding standard account shall be credited with the sum of —

(A) the amount considered contributed by the employer to or under the plan for the plan year,

* * *

(5) Interest. (A) In general. The funding standard account (and items therein) shall be charged or credited (as determined under regulations prescribed by the Secretary of the Treasury) with interest at the appropriate rate consistent with the rate or rates of interest used under the plan to determine costs.

* * *

**29 USC §1082**

**(c) Methods.** (1) For purposes of this part, normal costs, accrued liability, past service liabilities, and experience gains and losses shall be determined under the funding method used to determine costs under the plan.

(2)(A) For purposes of this part, the value of the plan's assets shall be determined on the basis of any reasonable actuarial method of valuation which takes into account fair market value and which is permitted under regulations prescribed by the Secretary of the Treasury.

* * *

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**29 USC §1102. Establishment of plan**

(a) Named fiduciaries. (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

**29 USC §1102.**

**(c) Optional features of plan.**

Any employee benefit plan may provide —

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

* * *

**29 USC §1103. Establishment of trust**

**(a) Benefit plan assets to be held in trust; authority of trustees.**

* * *

all assets of an employee benefit plan shall be held in trust by one or more trustees.

* * *

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**29 USC §1103.**

**(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets.** (1) Except as provided in paragraph (2), (3), or (4) of subsection (d), or under section 4042 and 4044 [29 USC §§ 1342, 1344] (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

* * *

**29 USC §1104. Fiduciary duties**

**(a) Prudent man standard of care.** (1) Subject to sections 403(c) and (d) [29 USC §1103(c) and (d)], 4042 [29 USC §1342], and 4044 [29 USC §1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and the beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such maters

would used in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

* * *

**29 USC § 1106. Prohibited transactions**

**(a) Transactions between plan and party in interest.** Except as provided in section 408 [29 USC §1108]:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —

(A) sale or exchange, or leasing, or any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan;

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a) [29 USC §1107(a)].

(2) No fiduciary who has authority to discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a) [29 USC §1107(a)].

**(b) Transaction between plan and fiduciary.** A fiduciary with respect to a plan shall not —

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

* * *

**29 USC §1113. Limitation of actions**

No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of —

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

**29 USC §1132. Civil enforcement**

**(a) Persons empowered to bring a civil action.** A civil action may be brought —

(1) by a participant or beneficiary —

(B) to recover benefits due to him under the terms of his plans, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

**29 USC §1132**

**(g) Attorney's fees and costs; awards in actions involving delinquent contributions.** (1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

*Appendix E*

* * *

TREAS. REG. §1.401-1(b)(3)

* * *

The plan must benefit the employees in general although it need not provide benefits for all of the employees.

* * *

Similarly, a stock bonus or profit-sharing plan is not a plan for the exclusive benefit of employees in general if the funds therein may be used to relieve the employer from contributing to a pension plan operating concurrently and covering the same employees.

* * *

**Rev. Rul. 69-295 — qualified profit-sharing plan may permit employees to transfer vested amounts to pension plan — PS No. 37 superseded.** — The purpose of this Revenue Ruling is to update and restate, under the current statute and regulations, the position set forth in PS No. 37, dated October 7, 1944, relating to the use of funds held by a profit-sharing trust to meet the costs of a qualified pension plan.

* * *

Section 1.401-1(b)(3) of the Income Tax Regulations provides that plan must benefit the employees in general. A profit-sharing or stock bonus plan is not for the exclusive benefit of employees in general if the funds therein may be used to relieve the employer from contributing to a pension plan operating concurrently and covering the same employees. All

of the surrounding and attendant circumstances and the details of the plan will be indicative of whether it is a bona fide plan for the exclusive benefit of employees in general.

A profit-sharing or stock bonus plan that permits the funds therein to be used to meet the costs of a pension or annuity plan operated concurrently and covering the same employees, if and when the employer suspends contributions to the latter plan, is generally called a "feeder" plan. As provided in section 1.401-1(b)(3) of the regulations, such a plan is not for the exclusive benefit of the employees or their beneficiaries because it relieves the employer from contributing to the pension or annuity plan.

* * *

**Sec. 401. INTERNAL REVENUE CODE**

(a) REQUIREMENTS FOR QUALIFICATION. — A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section —

* * *

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries

* * *

(2)

No. 98-0510

FILED
OCT 26 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

---

October Term, 1998

RUTH J. KUHNS,
Petitioner,

v.

CORESTATES FINANCIAL CORP., successor to
MERIDIAN BANCORP, INC., successor to
THE FIRST NATIONAL BANK OF ALLENTOWN,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

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# RESPONDENT'S BRIEF IN OPPOSITION

---

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33 pp

## I. QUESTION PRESENTED

Whether the Court should deny certiorari on the Court of Appeals' summary decision that petitioner's claims are barred by res judicata where the Court refused to grant certiorari in a prior action, *Kuhns v. Meridian Bancorp, Inc.*, 514 U.S. 1114 (1996), in which the Court of Appeals rejected the merits of petitioner's claims.

## II. PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

The petitioner is Ruth J. Kuhns, a plaintiff and purported class representative in the proceedings before the District Court and an appellant in the proceedings before the Court of Appeals. Respondent is CoreStates Financial Corp., the defendant in the proceedings before the District Court and the appellee in the proceedings before the Court of Appeals. CoreStates Financial Corp. was merged into First Union Corporation in 1998. Other than First Union Corporation, CoreStates Financial Corp. has no parent companies or non-wholly-owned subsidiaries requiring disclosure under Rule 29.6.

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*Hubicki v. ACF Indus., Inc.*, 484 F.2d 519 (3d Cir. 1973) . . . . . 8

*Huck v. Dawson*, 106 F.3d 45 (3d Cir.), *cert. denied*, 117 S. Ct. 2458 (1997) . . . . . 7, 8

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*Lockhead Corp. v. Spink*, 517 U.S. 882 (1996) . . . 12

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*Practice and Procedure* § 4427 (1981) . . . . . 9

*Restatement (Second) of Judgments* § 43 (1982) . . . . 9

## V. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) because this proceeding involves a judgment by the Court of Appeals for the Third Circuit in respondent's favor.

## VI. COUNTERSTATEMENT OF THE CASE

Although the Court previously found the so-called "merits" of Kuhns' claims unworthy of review, *Kuhns v. Meridian Bancorp, Inc.*, 514 U.S. 1114 (1996), Kuhns now asks the Court to review the dismissal, based on res judicata, of the same claims asserted in a subsequent action, *Kuhns v. CoreStates Financial Corp.*, 998 F. Supp. 573 (E.D. Pa. 1998) ("*Kuhns II*"). Far from a case deserving certiorari, this action involves only a misguided attempt by Kuhns and her counsel to extract a settlement through continued pursuit of meritless claims. Indeed, Kuhns' claims are so devoid of merit that the Court of Appeals *summarily affirmed* the dismissal of the action. *Kuhns v. CoreStates Financial Corp.*, No. 98-1303 (3d Cir. June 26, 1998). In short, this is not an action that warrants further review.

### A. Background of Prior Proceedings

In 1992, Kuhns and two other former employees of Meridian Bancorp's predecessor, the First National Bank of Allentown ("First National"), filed an action against Meridian captioned *Kuhns, et al. v. Meridian Bancorp, Inc.*, No. 92-CV-4065 (E.D. Pa.) ("*Kuhns I*"). *Kuhns I* was filed on behalf of a purported class of current and former employees of First National who were participants in a profit sharing plan (the "Profit Sharing Plan") that was converted into a defined benefit pension plan (the "Pension Plan") in 1971 by First National.

In *Kuhns I*, Kuhns alleged that First National (and later Meridian) violated state common law and the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 ("ERISA"), by

"embezzling" the account balances from the Profit Sharing Plan to fund some of the benefits in the Pension Plan and by creating and maintaining an allegedly improper benefit formula. With good reason, the Third Circuit flatly rejected this allegation, finding it "patently false" and "symptomatic of the failings of [Kuhns'] lawsuit." [Appendix at 6a]. In fact, when the Profit Sharing Plan was replaced with the Pension Plan (to provide better benefits), First National ensured that the participants' accrued benefits were not reduced through the Pension Plan's benefit formula. [Appendix at 4a n.3].

Ruling on Meridian's summary judgment motion, the District Court dismissed all of Kuhns' claims on statute of limitations and laches grounds, except for her claim that the Pension Plan's benefit formula provided an inadequate interest credit on the accrued benefits from the Profit Sharing Plan. *Kuhns v. Meridian Bancorp, Inc.*, No. 92-4065 (E.D. Pa. Feb. 8, 1993) (1993 U.S. Dist. LEXIS 5121). The District Court held that this allegation involved a possible "continuing violation" of ERISA that was not fully time-barred. Following a bench trial, the District Court adjusted the interest rate to 7.4% and recalculated Kuhns' Pension Plan benefits.

### B. Meridian's Successful Cross-Appeal

The parties then filed timely cross-appeals. *Kuhns, et al. v. Meridian Bancorp, Inc.*, Nos. 94-1839 and 94-1869, slip op. (3d Cir. Sept. 8, 1995). The Court of Appeals unanimously ruled in Meridian's favor and ordered the case "remanded to the district court with

directions to enter judgment for the defendants on all counts." [Appendix at 12a].[1]

This Court then denied Kuhns' petition for writ of certiorari, and final judgment was entered on all claims in favor of Meridian on March 15, 1996 in accordance with the Court of Appeals' decision.

Unfortunately, however, Kuhns' efforts to pursue her meritless claims did not end with the denial of her petition for writ of certiorari. As the District Court in *Kuhns II* described:

> After having moved for and been denied reconsideration by the Third Circuit, plaintiffs next moved to nevertheless compel the trustees to pay them benefits and to pay attorneys' fees as provided in the now-reversed order of the district court. They also sought leave to file a "supplemental complaint." These motions were naturally both denied. Plaintiffs moved the district court to reconsider its decision denying these motions, which was also denied and they thereafter took a second appeal to the Third Circuit. In addition to summarily affirming the district court's denial of the motions to compel payments and to amend the complaint, on August 14, 1997 the Third Circuit sanctioned plaintiffs' attorney for causing defendant excessive costs and expenses pursuant to 28 U.S.C. §1927.

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[1] The Third Circuit opinion is reproduced in the appendix.

*Kuhns II*, 998 F. Supp. at 576.

### C. The Present Action

While the Third Circuit's sanctions order apparently ended the litigation in *Kuhns I*, it did not dissuade Kuhns and her counsel from filing the present action, *Kuhns II*, which is yet another attempt to re-litigate issues that have already been explicitly rejected. For example:

1. Kuhns repeats her "continuing violation" argument, Complaint at 16, ¶22(b),[2] which was rejected by the Court of Appeals in its 1995 opinion (which this Court chose not to review). [Appendix at 7a-9a].

2. Kuhns again alleges "embezzlement" of plan assets, an allegation rejected in *Kuhns I* as "patently false." [Appendix at 6a].

3. Kuhns again claims ownership of the Profit Sharing Plan assets, another claim rejected in *Kuhns I*, 1993 U.S. Dist. LEXIS 5121 at *55-58. [Appendix at 6a].

4. Kuhns renews her claim for payment of both a profit sharing benefit and a defined benefit. Complaint at 20, ¶26(d). This claim too was raised (and rejected) in *Kuhns I*. [Appendix at 3a].

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[2] A copy of the complaint is contained in the appendix to Kuhns' petition.

In short, Kuhns challenges the same transaction she challenged before, asserts the same legal theories, and seeks the same relief she sought previously. There is, therefore, nothing new in this case since 1996 (when the Court denied Kuhns' previous petition for writ of certiorari) other than the proper dismissal of Kuhns' re-asserted claims based on res judicata.

## VII. REASONS FOR DENYING THE WRIT

This case presents no unsettled or controversial legal issues and the resolution of Kuhns' claims will have no impact on the public at large. Instead, as reflected by the Third Circuit's summary affirmance, the present petition involves only the dismissal, based on well-settled principles of res judicata, of claims this Court found unworthy of review in 1996.

### A. Res Judicata Bars Plaintiff's Claims.

The doctrine of res judicata applies when there is "(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action." *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 963 (3d Cir. 1991) (citation omitted).

Courts have rejected arguments (like Kuhns' argument here) that res judicata does not apply when a plaintiff suffers ongoing harm from conduct challenged unsuccessfully in a prior proceeding. One example is *Huck v. Dawson*, 106 F.3d 45 (3d Cir.), *cert. denied*, 117 S. Ct. 2458 (1997), where a prior action was filed by an air transport company ("Sea Air") against the owner of seaplane ramps to obtain access to the ramps. After Sea Air's claim was dismissed on summary judgment, a Sea Air shareholder sued derivatively on the company's behalf, repeating many of the same claims asserted in the prior action.

The shareholder in *Huck* argued that res judicata did not apply because, after the judgment in the prior action, the ramp owner "continued to deny Sea Air access to the sea ramps." *Id.* at 49. The *Huck* Court

flatly rejected this argument: "[T]he conduct of which Huck complains, *i.e.*, the denial of access to the sea ramps, is precisely the same conduct challenged in the earlier suit. . . . [I]t is difficult to understand how Huck can conclude that [the defendant], by acting upon authority of and in accordance with the judgment of the district court [in the prior action], created a new cause of action that was not barred by res judicata." *Id.* The Court also rejected the argument that a new cause of action (not barred by res judicata) arose because of new harm suffered from conduct previously found lawful. *Id.* at 50.

Here, the District Court and the Court of Appeals properly followed *Huck*, which foreclosed Kuhns' attempt to avoid res judicata. In fact, each of the requirements of res judicata is met just as easily here as they were in *Huck*.

**1. Final judgment on the merits.**

Both the summary judgment and the final judgment entered by the District Court in *Kuhns I* dismissing Kuhns' claims based on the statute of limitations and laches are "final judgments on the merits" with res judicata effect. *See, e.g., Hubicki v. ACF Indus., Inc.*, 484 F.2d 519, 522 (3d Cir. 1973) (disposition by summary judgment "went to the merits"), *followed in Rosetti v. Shalala*, 12 F.3d 1216, 1230-31 n.30 (3d Cir. 1993); *Hartley v. Foundation Equipment Corp.*, 1990 U.S. Dist. LEXIS 9841, *4 (E.D. Pa.) (dismissal of action under statute of limitations precludes a second action on the same claim). *See also Cannon v. Loyola Univ. of Chicago*, 784 F.2d 777, 781 (7th Cir. 1986) (dismissal based on laches is a judgment on the

merits); 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4427 (1981).

### 2. Same parties or their privies.

It is undisputed that CoreStates is a party in privity with Meridian. Complaint at 4, ¶¶3-4. Successors in interest such as CoreStates are entitled to the benefits of res judicata based on prior actions against their predecessors in interest. *E.g.*, *State Farm Fire & Cas. Co. v. Fullerton*, 118 F.3d 374, 384 (5th Cir. 1997); *Guerrero v. Katzen*, 774 F.2d 506, 509 (D.C. Cir. 1985); *Restatement (Second) of Judgments* § 43 (1982).

### 3. Identical causes of action.

The requirement of identity of causes of action is viewed broadly, and requires only "an essential similarity of the underlying events giving rise to the various legal claims." *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 984 (3d Cir. 1984) (citation omitted). Four factors decide this issue: (1) identical issues complained of and relief requested; (2) identical theory of recovery; (3) identical witnesses and documents; and (4) same material facts. Each of these factors are satisfied here.

First, Kuhns complains of the same acts, and seeks the same relief as she did in *Kuhns I*. The only difference is that she is now suing CoreStates rather than Meridian.

Again, Kuhns raises the same claim here she raised before: that CoreStates' current administration of the Pension Plan deprives Kuhns of her alleged property interest in the Plan's assets. *Id.* The Court of Appeals, however, rejected this claim when it held in *Kuhns I* that Meridian's alleged liability could not be based on its administration of the Pension Plan, but rather was based on the actions of First National in 1971. [Appendix at 9a (plaintiffs' cause of action accrued in 1971)]. Moreover, Kuhns seeks precisely the same relief (payment of both the alleged profit sharing benefit and the Pension Plan benefit) here that she sought in *Kuhns I*. Complaint at 17, ¶24.

Second, Kuhns asserts the same theories of recovery (breach of contract and breach of fiduciary duty) here as she did *Kuhns I*. Complaint at 16, ¶22(b). She even asserts the same "continuing violation" theory she used unsuccessfully in *Kuhns I*. Complaint at 16, ¶ 22(b).

Third, this case involves identical witnesses and documents because this action, like *Kuhns I*, challenges the lawfulness of First National's conduct in 1971. Significantly, Kuhns' state law claims were previously dismissed on laches grounds precisely because much of the evidence crucial to the defense was no longer available as a result of Kuhns' extraordinary delay in filing her claims. *Kuhns I*, 1993 U.S. Dist. LEXIS 5121 at * 19-28.

Finally, this case involves the same material facts as *Kuhns I* because all of the relevant facts were complete as of 1971 (*i.e.*, the formal replacement of the Profit Sharing Plan by the Pension Plan). [Appendix at 9a]. CoreStates' acquisition of Meridian does not alter this conclusion any more than Meridian's acquisition of First National did. *See supra* at 9 (successor in interest entitled to res judicata benefits of predecessor).

In sum, res judicata bars Kuhns' claims because (1) there was a final judgment in *Kuhns I*, (2) the parties here are identical or privy to those of *Kuhns I*, and (3) the two causes of action are identical. *Lubrizol*, 929 F.2d at 973. Kuhns therefore failed to state a claim upon which relief could be granted, her complaint was properly dismissed and her petition for writ of certiorari should be denied.[3]

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[3] The same conclusion is compelled under the doctrine of collateral estoppel, another issue raised in CoreStates' motion to dismiss. *Cf. Raytech Corp. v. White*, 54 F.3d 187 (3d Cir. 1995). Although the District Court did not reach the issue of collateral estoppel, the doctrine applies under the facts of this case and is another reason why Kuhns' petition for writ of certiorari should be denied. *Cf. Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63 (1986) (affirming judgment for reasons different than those relied upon by lower courts).

**B. There Are No National Issues Requiring Review**

Although all the issues raised here have been addressed in *Kuhns I*, Kuhns attempts to obtain review by this Court by arguing that there are national issues at stake because of the so-called misuse of plan assets in bank mergers as exemplified by CoreStates' alleged use of the Pension Plan assets to avoid the consequences of terminating the Pension Plan following the Meridian merger. [Petition at 2]. She further claims that despite the ruling in *Kuhns I* that her claims are time-barred, she is entitled to pursue this claim under *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), and *Campbell v. Holt*, 115 U.S. 620 (1885). Kuhns is wrong in both respects.

First, ERISA allows employers to merge or amend pension plans provided there is no reduction in accrued benefits. 29 U.S.C. §§ 1054(g) and 1058. In making such decisions, employers are not constrained by ERISA's fiduciary provisions. *Lockhead Corp. v. Spink*, 517 U.S. 882 (1996). CoreStates therefore had no duty to terminate any plan as a result of the Meridian merger. Moreover, because there was no reduction of Kuhns' accrued benefits, there is no claim (much less a "national" issue).

Second, Kuhns' reliance on *Chase Securities* and *Campbell* is misplaced. These cases stand for the proposition that the Fourteenth Amendment is not violated when a legislature enlarges a statute of limitations even though the legislation may revive certain time-barred claims. *Chase Securities*, 325 U.S. at 314-16; *Campbell*, 115 U.S. at 628-29. Here, however, there is no legislative action (as there was in *Chase*

*Securities* and *Campbell*) to revive Kuhns' claims, and any such legislation would, in any event, violate the Separation of Powers under Article III of the Constitution because a final judgment has been entered against Kuhns. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (legislation that would reinstate claims in which final judgments had been entered under the statute of limitations is unconstitutional). Kuhns' claims are therefore barred by the final judgment entered in *Kuhns I* and the Court should reject her petition.

## VIII. CONCLUSION

This case involves no conflict among the Circuits, no violation of federal law and raises no important federal issues requiring review by this Court. Instead, this case involves the application of the settled legal principles of res judicata to uphold the integrity of the final judgment entered in *Kuhns I*. Petitioner's disagreement with the application of settled legal principles to the facts of this case does not merit review by this Court. For these reasons, respondent respectfully requests the Court to deny petitioner's petition for writ of certiorari.

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NOT-FOR-PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NOS. 94-1839 and 94-1869

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RUTH J. KUHNS; BLAKE C. HEFFNER;
WILLIAM W. SHELLHAMMER, an behalf of
themselves and all others similarly situated

v.

MERIDIAN BANCORP, INC., successor to
THE FIRST NATIONAL BANK OF ALLENTOWN

Ruth J. Kuhns, Blake C. Heffner and
William W. Shellhammer, for themselves
and as representatives of the Plaintiff
Class, Appellants in No. 94-1839

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RUTH J. KUHNS; BLAKE C. HEFFNER;
WILLIAM W. SHELLHAMMER, on behalf of
themselves and all others similarly situated

v.

MERIDIAN BANCORP, INC., successor to the
FIRST NATIONAL BANK OF ALLENTOWN

Meridian Bancorp, Inc., successor to the
First National Bank of Allentown,
Appellant in No. 94-1869

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On Appeal From the United States District Court
For the Eastern District of Pennsylvania
D.C. Civ. No. 92-cv-04065
District Judge: Honorable Edward N. Cahn, Chief Judge

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Argued: July 26, 1995

Before: BECKER, NYGAARD, and ALITO,
Circuit Judges

(Filed September 8 - 1995)

## OPINION OF THE COURT

BECKER, Circuit Judge,

Plaintiffs, Ruth J. Kuhns, Blake Heffner and William W. Shellhammer, have appealed from a judgment of the district court granting summary judgment for defendant, Meridian Bancorp, Inc. ("Meridian"), on certain state law and ERISA claims brought against Meridian by plaintiffs on their own behalf and on behalf of a class of others similarly situated. More particularly, the district court held that the plaintiffs' state law claims were barred by laches and that their ERISA claims were barred, in part, by the statute of limitations. After a bench trial, the court held that plaintiffs were not entitled to both a retirement benefit and a profit sharing benefit as they claimed, but determined that the benefits to which they were entitled should be recalculated using an interest rate of 7.4%. This was because of the district court's view that the 4% interest rate provided in the defined benefit plan was too low. Meridian has cross-appealed from the court's failure to bar all of the plaintiffs' untimely claims, its refusal to apply ERISA's non-retroactivity provisions, and its imposition of a 7.4% interest rate. On the plaintiffs' appeal, we affirm; on Meridian's appeal, we reverse.

I

The etiology of plaintiffs' cause of action is the decision made way back in 1970 by the First National Bank of Allentown, Meridian's predecessor, concerning its employee benefits package. At that time, the bank switched from a defined contribution (profit sharing) plan to a defined benefit plan (the changes were effectuated in 1971). In adopting this change in plans, the company attempted to preserve the account balances of plan participants (at the time of the change in plans) by offering a choice to retiring employees between participation in the defined benefit plan or their 1971 account balance compounded to the date of their retirement at an annual rate of return of 4%.[4] This offer was instituted for all bank employees (including all the plaintiffs in this action) and detailed information about the plan was provided to all the plaintiffs in 1971. In 1981, the defendant raised the percentage to 5% retroactive to 1/1/76. The defined benefit plan was established to replace (not supplement) the profit sharing plan, which, in the bank's judgment, had provided inadequate benefits for the bank's employees. Notwithstanding this fact, and the fact that all the bank's employees were notified of the changes (and that one of the plaintiffs, Mr. Shellhammer, was a "key player" in

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[4] More precisely, the defined benefit plan provided a retirement benefit equal to the "greater of" (a) a defined benefit based on the employees' total years of service (including service before the profit sharing plan existed) and the employees' final average pay before retirement; or (b) a lifetime annuity based on the value of the employees' account balances in the now-replaced profit sharing plan compounded at a rate of 4% interest.

connection therewith,[5] it was not until 1991, over twenty years after the 1970 bank action, that these plaintiffs brought the present lawsuit in which they claim that they

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[5] Shellhammer attended the meeting of the pension trustees on November 21, 1970, where Beyer-Barber, a consulting firm retained by the bank, recommended to the plan trustees to convert their Profit Sharing plan to a defined benefit pension plan. Indeed, Shellhammer presented the trustees' recommendations to convert the plan on December 21, 1970 to the bank's board of directors on behalf of the trustees. Additionally, on a separate occasion in 1980, the bank provided Shellhammer with pension calculations reflecting the interest rate credited to his profit sharing account. Moreover, plaintiff Heffner testified that he complained about the transaction as early as 1971, but decided it was not in his "best interest" to pursue it at the time. Finally, plaintiff Kuhns retained counsel in 1986 and through counsel raised many of these issues with the bank at that time: like the other bank employees, she was given detailed information about the transaction in 1971. More specifically (on the latter point), the transaction involving the Pension Plan and its use of the Profit Sharing Plan's assets was announced in an employee news bulletin and explained by Shellhammer and others at employee meetings. It was described in the Bank's 1971 Annual Report and at the annual shareholders' meeting, where Shellhammer was designated to answer questions. A benefit booklet was distributed to all employees explaining how the Profit Sharing Plan's assets would receive be used as partial funding for the benefits under the new plan. The employees were also told they would receive only one retirement benefit, not two.

are entitled to both the enhanced defined benefit and the profit sharing benefit it replaced. Indeed, plaintiffs allege repeatedly in their brief that the bank "embezzled" their money. This allegation is patently false, and is symptomatic of the failings of their lawsuit.[6]

We need not recount in great detail either the additional factual background or procedural history of this case, since it is well known to the parties. Additionally, we do not discuss those aspects of this case in which plaintiffs' claims were rejected by the district court, for in those respects we affirm essentially for the reasons set forth in its opinions.[7] Rather, we limit our discussion to the issues raised in the cross-appeal.

II

While dismissing all but Shellhammer's claim on statute of limitations grounds, *see infra*, the district court concluded that the plaintiffs' claims were viable as to the amount of their monthly pension checks

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[6] Neither, despite the vigor into which it is advocated, have the plaintiffs made a colorable showing that the transaction, to the extent that it had to be approved by the Internal Revenue Service, was not in fact approved. The delay in bringing this action has contributed to the uncertainty in this area, for many of the relevant documents have been lost or discarded.

[7] We reject Meridian's contention, however, that plaintiffs waived their right to appeal the district court's dismissal of their state law claims.

received within ERISA's three year statute of limitations.[8] For instance, since this case was brought on July 13, 1992, Kuhns could, in the district court's view, recover for the interest rate differential attributable to all pension payments made after July 13, 1989 (the date before which such claims would be barred by the applicable three year statute of limitations of ERISA §1113).

In reaching this conclusion the district court incorrectly relied on the "continuing violation" rationale of the Ninth Circuit opinion in *Meagher v. International Association of Machinists & Aerospace*

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[8] Section 1113 of ERISA provides:

No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, ... or

(2) three years after the earliest date on which the plaintiff had

actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

*Workers Pension Plan*, 856 F.2d 1418 (9th Cir. 1988). In that case, the Ninth Circuit analyzed when a plan amendment phasing out a living pension feature of a company's pension plan gave rise to a cause of action under ERISA § 1054(g)(1) (which provides for a cause of action against a plan when a participant's "accrued benefits were 'decreased by an amendment.'") *Id.* at 1422 (quoting ERISA § 1054(g)(1)). In *Meagher*, the Ninth Circuit reversed the district court's "assumption that the violation in this case was the enactment or the amendment." *Id.* The court reasoned:

> Meagher's cause of action accrued only when his accrued benefits were "decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title." 29 U.S.C. § 1054(g)(1). The district court suggests that passage of the inoperative amendment, or when Meagher found out the amendment was passed, was the precise accrual date. We disagree Meagher was harmed only by the wrongful application of the amendment. Only then were his accrued benefits decreased. The passage of the amendment was not a violation of ERISA . . .

856 F.2d at 1422. The result in *Meagher* emanates from the particular language of § 1054(g)(1) requiring that a participants benefits actually be "decreased" before the participant's cause of action could accrue.

In contrast, the plaintiffs' claim in this action are brought under ERISA § 1104(a), which provides that a fiduciary "shall discharge his duties with

respect to a plan solely in the interest of the participants" and ERISA § 1103(c), which provides that "the assets of the plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to the participants." These sections, unlike § 1054(q)(1), do not require that a participant's benefits be "decreased by an amendment to the plan." Rather, the plaintiffs in this action would have had a cause of action under these sections at any time the facts were sufficient to make out a claim that the defendant was improperly using plan assets. Facts sufficient to make out such a claim would have been available from 1971 forward, when the profit sharing plan was converted to a defined benefit plan. Thus, Shellhammer's claims is also time barred under § 1113 of ERISA.

III

The district court relied on the applicable three-year statute of limitations in § 1113 of ERISA to dismiss all but one of the plaintiffs' actions (Shellhammer's) given that all plaintiffs except Shellhammer retained counsel and raised the issues implicated in this appeal with the defendant's general counsel in 1986, more than three years before this case was brought in 1991. *See* Dist. Ct. Op. 28-32. The district court erred, however, in failing to also dismiss the claim of Shellhammer, who was a fairly high-ranking employee whose extensive involvement in the 1970 decisions is chronicled supra at n.2.

Notwithstanding Shellhammer's extensive knowledge regarding the 1970 transaction, the district court, relying on our opinion in *Gluck v. Unisys Corp.*, 960 F.2d 1168, (3d Cir. 1992), rejected the defendant's

contention that Shellhammer had "actual knowledge of a breach or violation" under ERISA § 1113(2):

> [T]his court finds that Shellhammer did not have actual knowledge of the putative breaches more than three years before the plaintiff initiated the lawsuit. Although Shellhammer attended the meetings where the trust modifications were discussed and made the presentation to the Board of Directors, he did not have the requisite knowledge that *Gluck* requires. Indeed, Shellhammer is the quintessential example of a participant who would have actual knowledge under the *Blanton* test -- he had knowledge of the underlying facts but did not have knowledge of the law. Since that test has been expressly rejected by the Third Circuit Court of Appeals, more information is needed to determine whether Shellhammer had actual knowledge.

Dist. Ct. Op. at 32. While our decision in *Gluck* is admittedly opaque, we believe the district court misreads its requirements of "actual knowledge." The district court stated:

> the [*Gluck*] court emphasized that its holding "does not mean the statute of limitations can never begin to run until a plaintiff first consults with a lawyer." This language suggests that participants who do not consult with an attorney will usually be deemed not have actual knowledge under § 1113(2) because in all

> probability they will not be aware that the transactions give rise to an ERISA violation.

Dist. Ct. Op. at 28 (citation omitted).

Analyzed properly under the language of *Gluck*, Shellhammer did have actual knowledge. In particular, he had "actual knowledge of all material facts necessary to understand that some claim exists." *Gluck*, 960 F.2d at 1177. From the outset of the transaction in 1970, Shellhammer was aware that the profit sharing accounts of participants were going to be preserved through a set percentage rate of 4%. Such knowledge constituted "knowledge of all relevant facts at least sufficient to give the plaintiff knowledge that a fiduciary duty has been breached or ERISA provision violated." *Gluck*, 960 F.2d at 1178. This is all that *Gluck* requires.

IV

The result of the foregoing discussion is that all of plaintiffs' claims must be dismissed.[9] Accordingly, we need not reach the questions, presented by the cross-appeal, whether the district court applied improper legal standards and abused its discretion in

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[9] In reversing the district court's order as to the issue raised in Meridian's cross-appeal, we need not reach Meridian's contentions that ERISA's non-retroactivity provisions bar the plaintiffs' ERISA claims and the district court erred by not dismissing the plaintiffs' ERISA claims based on laches. These contentions appear to have merit and would be alternate grounds for reversal on the cross-appeal.

selecting the 7.4% rate or erred by imposing a post-retirement interest credit. The judgment of the district court insofar it is challenged in No. 94-1839 will be affirmed, but insofar as it is challenged in 94-1869, will be reversed, and the case remanded to the district court with directions to enter judgment for the defendants on all counts.

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TO THE CLERK:

Please file the foregoing opinion.

BY THE COURT:

_____
Circuit Judge

(3)

No. 98-510

FILED
NOV 19 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

# Supreme Court of the United States

October Term, 1997

RUTH J. KUHNS,

*Petitioner,*

*vs.*

CORESTATES FINANCIAL CORP., successor to MERIDIAN BANCORP, INC., successor to THE FIRST NATIONAL BANK OF ALLENTOWN,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## REPLY BRIEF FOR PETITIONER

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To the Honorable, the Justices of the Supreme Court:

The petitioner, Ruth J. Kuhns (Kuhns, or Petitioner) would reply to the brief of Corestates Financial Corp. (Corestates or Respondent) filed by it in opposition to Kuhns' Petition for a Writ of Certiorari, as follows:

This brief will be deliberately kept short. It is written from a hospital bed.

Corestates has never filed an Answer in this entire proceeding, including the first case (which Corestates calls "Kuhns I"). Notably, Corestates has not pleaded the statute of limitations in the present or the prior case. Corestates nonetheless makes many assertions of fact in its brief in opposition which are not on the record. Not only has Corestates not pleaded or proven any of the facts asserted, there never was a trial or a hearing to determine any disputed issue of fact. District Court Chief Judge Cahn, in the first case, took evidence only on the narrow issue as to what the "reasonable rate of return," which was to be credited to the individual account balances of the participants (members of the Plaintiff class, Kuhns, in the present case). Judge Cahn found that this rate should be 7.4% instead of the 4% (later 5%) arbitrarily used by Corestates' trustee in calculating the benefits due the participants. (The Third Circuit in the first case reversed even that finding.)

It was and is false for the Respondent to assert in its brief that there was otherwise ever a trial or any other determination on the merits, either in the first case, or in the present case.

In the present case, District Judge Joyner, at a Status Conference called by him in lieu of an oral argument on Corestates Motion to Dismiss (and held two days before he

filed a 10 page opinion and order granting the motion to dismiss) admitted that he had not read the Complaint in the present case. In spite of the obvious abuse of discretion by Judge Joyner in considering only the motion and brief of Respondent, the District Court had no basis for dismissal. The only facts on the record in the present case are those averred in the unread Complaint. Further, in dismissing the Complaint in the present case, the District Court ignored the undisputed fact that the interests of the participants were fully vested in them, a fact pleaded in the unread Complaint. The Third Circuit affirmed under Rule 12(b)(6) on the basis of the statue of limitations (29 U.S.C. § 1113), a defense not raised of record by Corestates.

It is a national issue, Petitioner submits, whether it is appropriate for the Third Circuit to have affirmed dismissal on an issue not even pleaded (statute of limitations), especially in view of the long standing decision of this Court holding that while a statute of limitations may bar the remedy, it does not divest the right. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S. Ct. 1137, 1142 (1945).

The taking of funds from the Profit Sharing Trust each year has worked, and continues to work a divestiture of vested property rights of the participants (Kuhns, and the rest of the plaintiff class). In the Profit Sharing Plan, the rights of the participants are fully vested, and have been fully vested for years. How can they be divested by the Trustee bank? The rights of the participants here are vested. Divestiture was never permitted, not in the years gone by prior to the first case, not for 1997 (the present case), and not in the years which follow. 29 U.S.C. § 1103(c)(1). The funds of the profit sharing trust "shall never inure to the benefit of any employer." *Id.* The funds of the profit sharing trust must be applied exclusively for the benefit of the participants (Kuhns and the others in the plaintiff class). *Id.*

The decision in the first case stands only for the narrow proposition that Kuhns and the others in the plaintiff class were time barred from claiming relief for funds taken to that time. The decision in the first case did not and could not as a matter of law award the fund to the Respondent. 29 U.S.C. § 1103(c)(3).

Each year, the Profit Sharing Plan generates new revenue. Each year, from 1997, the year in question, and in each year thereafter, there has been an unlawful taking from the profit sharing trust fund of the newly generated revenue, property vested exclusively for the benefit of the participants (Kuhns and the rest of the plaintiff class.) As to each subsequent separate taking, beginning in 1997, there is neither a claim preclusion, an issue preclusion, or a time bar to recovery. Based on the statute of limitations, 29 U.S.C. § 1129, the claim for relief of Kuhns in the present case was timely filed. Based on the taking of funds generated by the fund in 1997, the dispute is over a new and different amount, fully vested in the participants, which must be used exclusively for the benefit of these aged, and ever aging bank retirees, their surviving spouses and participant heirs.

So far as the Petitioner is aware, the following national issue is a question of first impression before the Supreme Court: whether it is proper following a merger or other acquisition, for the surviving entity to take funds vested for the exclusive benefit of participants in a plan created by the acquired entity, and to apply those funds taken for the benefit of the employer, or other plans in the surviving entity.

The petition should be granted.

Respectfully submitted,

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